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OUTLINES

OF

CRIMINAL LAW

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OF

CRIMINAL LAW

BASED ON LECTURES DELIVERED IN THE UNIVERSITY OF CAMBRIDGE

BY

COURTNEY STANHOPE KENNY, LL.D.

OF LINCOLN'S INN; LATE M.P. FOR BARNSLEY;
DOWNING PROFESSOR OF THE LAWS OF ENGLAND.

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PREFACE.

Some excuse seems necessary for adding to the now somewhat redundant stores of English legal literature another elementary manual of Criminal Law. The only justification I can offer lies in the fact that the present volume embodies the substance of lectures which have been delivered at Cambridge year by year throughout the past quarter of a century—a period long enough to afford even the least competent lecturer some opportunity of ascertaining what principles, and what illustrations, are so successful in arresting the attention and impressing the memory of students as to be worth putting before them in the earliest manual which they peruse.

In reducing my lectures to the form of a book, I have kept in view the needs of two classes of readers. For a general outline of Criminal Law may prove useful not only to young men preparing for academical or professional examinations, but also to many older men when called upon to undertake, without previous legal training, the duties of a justice of the

peace. Both these classes find it important, moreover, to familiarize themselves with the foundations of the law of Evidence; and I have therefore devoted a portion of the present volume to that subject.

In preparing the book, I have aimed at making its range of topics no wider than may be grasped, upon a first perusal, even by a reader previously unfamiliar with law. But I have tried to treat each individual topic with such fulness as may serve to fix it effectually in the reader's memory. Yet the susceptibility of his memory must depend very much (as all lecturers soon discover) upon the extent to which the matter in hand arouses his interest. Fortunately the law of Crime—when once the preliminary difficulties attendant upon the chaotic form which it still retains in England have been faced and surmounted—is a branch of jurisprudence peculiarly capable of being rendered interesting. It is closely linked with history, with ethics, with politics, with philanthropy. My endeavour has been to make it attractive to the reader, by supplying him with enough illustrative examples to give vividness and reality to all the abstract principles of our Criminal Law; and also by tracing out its connexion with the past sufficiently to explain the various historical anomalies with which it is still encumbered; and, moreover, by suggesting to him the most important

controversies—psychological, social, juridical—that it seems likely to arouse in the future. Partly for the last-mentioned purpose, and partly because their importance even for present-day practice seems to me to be greater than is often supposed, I have given more than usual prominence to the subjects of Malice, Responsibility, and the Measure of Punishment. I also have availed myself freely of the official statistics of our courts and prisons; in the hopes of enabling the reader to obtain a precise idea of the present administration of criminal justice in this country, and of the comparative importance of the various forms of its procedure. And I have taken account, in various places, of the important, though as yet unsuccessful, efforts made by Parliament more than twenty years ago to improve both the substance and the form of English criminal law.

To readers who have time to utilize the references given in the footnotes, it may be well to explain that I have preferred to cite Pollock and Maitland's *History of English Law* by the pages of its first edition, since that numbering remains recorded on the margins of the second edition also; and, further, that the cases cited as from "K. S. C." will be found in the volume of *Select Cases in Criminal Law*, prepared by me for the Cambridge University Press.

I cannot conclude this Preface without expressing the cordial thanks I owe to my friend, Mr R. T. Wright, for his great kindness in reading through the whole of the proof-sheets and favouring me with many valuable suggestions; as also to my friend and former pupil, Mr W. C. A. Landon, of Gray's Inn, for assiduously aiding me to prepare the book for the press, and for compiling the index.

DOWNING COLLEGE, CAMBRIDGE,
May 1902.

PREFACE TO THE THIRD EDITION.

In hopes of rendering the book more full and more clear, I have introduced many slight alterations. A detailed account, also, of the new Court of Criminal Appeal is given at pp. 419, 490.

I learn that some beginners find Chapter I., in its attempt to define the nature of Crime, exceptionally difficult. Those who do so, I advise to postpone its perusal until after they have read the rest of the volume. Definitions belong, indeed, rather to the end of our knowledge than to the beginning of it.

Oct. 1907.

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BOOK I.

GENERAL CONSIDERATIONS.

CHAPTER I.

THE NATURE OF A CRIME.

THROUGHOUT some twenty-five years' experience as an academical lecturer upon various legal subjects, I have found that criminal law is usually regarded, both by its students and by its teachers, as one of the most attractive portions of their work. It has of course a great practical importance; on account of the large number of our criminal tribunals and, consequently, of the persons who have to take part in their administration. For to young counsel and solicitors these criminal courts offer the readiest access to professional employment and thus to experience, instructive if not lucrative, in the practical details of advocacy. And even persons who have no professional interest in legal matters often find themselves engaged, as jurymen or Justices of the Peace, in discharging public duties in which a knowledge of the criminal law is of great assistance to them. Again, without any such call either of public duty or of professional activity, the plainest private citizen may easily have direct personal cause to realise the value of this kind of knowledge. For

our civilisation is not yet so perfect that a man can be sure that even the most prudent administration of his affairs will save him from having to invoke the protection of the criminal law, or that even the highest moral rectitude will remove all risk of his having to defend himself against groundless and malicious criminal accusations. But there are also other causes, less utilitarian than any of these, which nevertheless play a still greater part in giving the criminal portion of our law that special attractiveness which it unquestionably has, not only for professional students but even for ordinary readers. For this branch of study is rendered attractive to all thoughtful men by its direct bearing on the most urgent social difficulties of our time and on the deepest ethical problems of all times. And almost all men, whether thoughtful or thoughtless, are fascinated by its dramatic character—the vivid and violent nature of the events which criminal courts notice and repress, as well as of those by which they effect the repression. Forcible interferences with property and liberty, with person and life, are the causes which bring criminal law into operation; and its operations are themselves directed to the infliction of similar acts of seizure, suffering, and slaughter. The utmost violence which administrators of civil justice have power to inflict ranks only amongst the gentlest of those penalties by which the criminal courts do their work. Hence of all branches of legal study there is no other which stirs men's imaginations and sympathies so readily and so deeply.

The interest thus aroused tends naturally to facilitate the progress of law students through the difficulties of this subject; and has done much to produce the impression, which happily prevails in the minds of most of them, that this branch of their work is peculiarly easy. That impression is erroneous; though no doubt, the beginner may acquire such a knowledge of criminal law as suffices for ordinary needs, either of examination or of everyday practice, without

having to face so many points of intrinsic difficulty as he will usually find it necessary to master, whether for practice or for examination, in any other leading branch of our law.

But there is one grave—if not indeed insoluble—difficulty which has to be faced in studying the law of crime. And this difficulty unhappily comes at the very outset of the subject. For it consists of the fundamental problem—*What is a Crime?* Clearly the criminal law is concerned with crimes alone, not with illegal acts in general. But how are we to distinguish those breaches of law which are crimes from those which are merely illegal without being criminal?

Many attempts have been made to answer this question, and to propound a general definition of crime which shall distinguish wrongs which are criminal from those which are merely "civil." Moreover, as the distinction between criminal and non-criminal law is not peculiar to England but is familiar in every civilised country, attempts have naturally been made to go a step further, and to look for such a definition of crime as will express this difference in a form so general as to be applicable, not merely to England, but to all countries in which this world-wide distinction between criminal and civil prevails.

In attempting, whether for this general purpose or merely with reference to English law, to frame a definition of crime which shall separate the illegal acts that are criminal from those which must be treated in another branch of the law of wrongs, the first course which naturally occurs to us is to see if some distinctive peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

(1) This was a course adopted by Sir William Blackstone when writing the great classical text-book of English law. The fourth volume of his *Commentaries on the Laws of England* is devoted to "Public Wrongs," or crimes; and his definition

[1] See Salmond's *Jurisprudence*, ed. 1907, § 27.

of a public wrong is given at the outset of it, though in two somewhat dissimilar forms. Of these the first is, "an act committed or omitted in violation of a *public law* forbidding or commanding it[1]." This answer, however, only drives us to the further question, What is meant by "public" law? That phrase has several well-accepted senses, but none of them seems applicable here. For if, with Austin[2], we take public to be identical with constitutional law, then Blackstone's definition will cover political offences alone, though they are only an extremely small portion of the whole field of crime. If again, with the Germans, we take public law to include, along with constitutional law, criminal law itself[3], the definition ceases to define. And if, finally, we adopt the only other familiar sense, and consider public law as equivalent to what is now more commonly called 'positive law' or 'municipal law'—that is to say, all law which has been made by the public authorities of a State[4]—the definition will obviously become too wide; for it will cover every legal wrong.

(2) We must therefore pass to Blackstone's next definition. According to this, a crime is "a violation of the *public* rights and duties due to the whole community, considered as a community[1]." Blackstone, of course, does not intend to suggest by this that crimes violate no other rights besides public ones; for obviously every theft violates some private right of property. What he meant is expressed more clearly in the form given to this definition by Serjeant Stephen in editing, or rather reconstructing, the Commentaries:—"A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large." It may be remarked, in passing, that this form of words introduces a new error, by limiting crimes to violations "of rights"; whereas, as Blackstone had correctly pointed

[1] 4 Bl. Comm. 5. [2] *Jurisprudence*, Lecture xliv., p. 770.
[3] Holland, *Jurisprudence*, ch. ix., ch. xvi. [4] Austin, pp. 781, 787.

out, a crime may be a violation either of a right or of a duty. For one remarkable difference between criminal and "civil" (*i.e.* non-criminal) law lies, as we shall subsequently see, in the fact that breaches of the latter always involve an infringement of some definite person's right, whilst the criminal law makes it our duty to abstain from various objectionable acts although no particular person's rights would be invaded by our doing them. Instances of crimes which do not violate any one's right may be found in the offences of engraving upon any metal plate (even when it is your own) the words of a bank-note, without lawful excuse for so doing[1]; or of being found in possession of house-breaking tools by night[2]; or of keeping a live Colorado beetle[3].

The idea which Blackstone and Stephen are here attempting to embody is one of great importance, if only on account of the wide currency it has obtained; and it deserves a very close scrutiny. Crimes, according to this idea, are such breaches of law as injure the community. Now there can be no doubt that if we make a merely general contrast between crimes, taken as a mass, and the remaining forms of illegal conduct, taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even so early as in the days of the Roman Empire. Roman jurists who noted this specially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "delicta *publica*" and criminal trials "judicia *publica*." As a matter of actual history, those phrases were not suggested originally by this; nor even, as Justinian fancied (Inst. 4. 18. 1), by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crimes were *tried* by the public itself, *i.e.*, by

[1] 24 and 25 Vict. c. 98, s. 16. [2] Ibid. s. 58.
[3] 40 and 41 Vict. c. 68.

the whole Roman people assembled in comitia centuriata. Long after this form of trial had become obsolete, and the origin of the epithet consequently obscure, crimes still continued to be called "public." And the phrase did not end with the Roman law; but, as we have seen, plays a prominent part in the classifications and the definitions of our own Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it as sufficient foundation for the precise accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing"; telling us something that shall be true of every crime, and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define crimes by mere help of the vague fact that "they usually injure the community." For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Indeed had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover we cannot even make the question one of degree, and say that crimes are always *more* injurious to the community than civil wrongs are. For it is easy to find instances to the contrary. Thus, until 9 Geo. I. c. 22, English law made it no crime to kill another person's horses, though it was a crime to steal them; yet the former wrong, since it involved the actual destruction of wealth, was obviously the more injurious to the community.

Similarly, even at the present day, it is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a Company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton

pocket handkerchief, though that petty theft is a felonious crime. Indeed a person's conduct may amount to a crime even though, instead of being an evil to the community, it is, on the whole, a benefit; as where a defendant was held guilty of the offence of a common nuisance, because he had erected in Cowes Harbour a sloping causeway which to some extent hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were considered by the jury to more than counterbalance that hindrance[1].

Hence we cannot say, with anything like that unvarying precision which a definition requires, that a legal wrong is a crime if it tends to cause evil to the community. Nay, it does not necessarily become a crime even when this public evil tendency is expressly recognised by law, and made the sole ground for legally prohibiting the hurtful conduct. For there still exists in English law a well-known class of proceedings called "penal actions," by which pecuniary penalties can be recovered, by any informer who will sue for them, from the doers of various prohibited acts; these acts being thus prohibited, and visited with penalties, solely on account of their tendency to cause evil to the community at large, "considered as a community." For example, a person who, in advertising a reward for the return of lost property, adds that "no questions will be asked," incurs by the Larceny Act a penalty of £50 recoverable by anyone who will sue for it[2]. In like manner, the County Courts Act 1888 provides that if any officer of a county court shall act as a solicitor in any suit in that court, he shall be liable to a penalty of £50[3] similarly recoverable. Yet the litigation by which an informer enforces such a penalty against a wrong-doer is not

[1] *Rex* v. *Ward*, 4 Ad. and E. 384.

[2] 24 and 25 Vict. c. 96, s. 102. See *Mirams* v. *Our Dogs Publishing Co. Ld.*, L. R. [1901] 2 K. B. 564.

[3] 51 and 52 Vict. c. 43, s. 41.

treated by English law as a criminal, but as a "civil," proceeding; and the wrong-doing itself is not regarded as a crime[1]. This anomalous method of checking ill-doing has long been discredited; but in the early part of the nineteenth century it was so popular with Parliament that every session saw new instances of it enacted[2].

Hence to speak of crimes as those forms of legal wrong which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them, but is not an accurate definition.

(3) The same may be said of a way of distinguishing them which is often adopted in the course of political discussions, and which probably is the one that most naturally suggests itself to an ordinary man's mind—the limitation of the idea of crime to those legal wrongs which violently offend our moral feelings. Here again, however, we only find a rough test; it holds of *grave*[3] crimes in the mass, as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. It is in recognition of the fact that many crimes involve little or no ethical blame[3], that Natal and West Australia, when recently prohibiting the immigration of convicted criminals, limited the prohibition to those whose offences "involved moral turpitude." Thus, for example, Treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington, "it arises from mistaken virtue, and therefore, however highly criminal, cannot be considered disgraceful";—a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, to take a very different

[1] *Atcheson* v. *Everitt*, 1 Cowp. 382 (K. S. C. 4).

[2] Espinasse, *Penal Actions* (1803).

[3] *E.g.*, of nearly all *indictable* offences, but not of innumerable breaches of our educational or sanitary or municipal statutes.

example, the mere omission to keep a highway in repair shocks nobody, but it is a crime; whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs. Conduct may, of course, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow trough, would arouse universal indignation; but he would have committed neither a criminal nor even a civil wrong.

This failure of the most approved tests of criminality that are based on the nature or natural consequences of the criminal acts themselves, may lead us to suspect that there exists no intrinsic distinction between those acts which are crimes and those which are not. It may nevertheless be possible to trace some extrinsic one. For there may be some unmistakable difference between the respective legal consequences of these two classes of acts. It would, indeed, be purely technical; amounting merely to a distinction between criminal procedure and civil procedure. But it would at any rate enable us to distinguish between these two, and then to define a crime as being "an act which gives rise to that kind of procedure which is styled criminal."

(4) Some writers have laid stress upon a difference between the respective degrees of activity manifested by the State in the two cases. In "civil" matters, say they, the State does not interpose until actual wrong has been done; and, even then, it does not interpose unless some private person institutes litigation; and no person is allowed to institute it except the one who has been directly injured by the wrong. In criminal matters, on the other hand, every civilised State maintains an elaborate staff of police officials charged with the duty of taking antecedent precautions to prevent offences from being committed; and, if one be committed, a prosecution may always be—indeed in many countries, it can only be[1]—

[1] Thus in France the Code d'Instruction Criminelle provides (Art. I.) that "L'action pour l'application des peines n'appartient qu'aux fonction-

instituted by public functionaries, without any cooperation on the part of the person injured; and possibly the law may (as in England it does) give every person in the community, whether injured or not, a right to institute a prosecution. This contrast is a genuine and a vivid one; and the tendency of modern criminal legislation is to intensify it. Yet it cannot be applied with such unvarying precision as to afford the basis for a definition. For, on the one hand, civil proceedings are often taken in order to obtain an "injunction" against some anticipated wrong which has not yet been actually committed; and, on the other, many offences that are undeniably criminal are so trivial that the police would not interfere beforehand to prevent them. Again, there are some few crimes for which, even in English law, a prosecution cannot be initiated by any private person, even though it be the victim himself, except by direct permission from the State[1]; whilst, as we have seen, those "penal actions" which may be instituted by any private person who chooses to turn informer, are classed amongst civil proceedings. And the fact that there exist many private local "Associations for the Prosecution of Felons" serves at least to shew that, from a practical point of view, the activity of the State in initiating criminal prosecutions still leaves much to be desired.

(5) It might, again, be expected that the two procedures could be distinguished by a difference in the tribunals in which they are employed. But this is not so; for as we shall hereafter see, it often happens, alike in the case of the humblest and of the most dignified tribunals, that both criminal and civil proceedings may be taken in the same court.

(6) But between the two kinds of proceedings themselves various points of contrast have been remarked. It is evident,

naires." In Scotland, though it is theoretically possible for an injured person to prosecute, such private prosecutions, except in mere petty complaints, have long been obsolete.

[1] *E.g.* the crimes specified in the Vexatious Indictments Act, 1859 (22 and 23 Vict. c. 17).

for instance, that the object of criminal procedure always is *Punishment*; the convicted offender is made to undergo evil which is inflicted on him not for the sake of redress but for the sake of example. The infliction does not provide compensation to the person who has been injured by the crime, but is simply a warning—a *documentum*, as the Roman lawyers called it[1]—to persons in general not to cause such injuries. In civil proceedings, on the other hand, the order which is made against an unsuccessful defendant is usually concerned with no interests but those of the parties to the litigation; the defendant is forbidden to infringe the plaintiff's rights, or still more frequently, is directed to pay him a sum of money in reparation of some right which he already has actually infringed. In assessing that sum of money, the tribunal will usually be guided by the amount of loss the plaintiff has sustained through the wrong, without considering whether or not that amount is large enough to render the payment of it so inconvenient to the defendant as to be a lesson to him. Even where the wrong complained of is an adultery[2], the damages given to the injured husband must (it is now settled) be no greater against an adulterer who is rich than they would be were he poor. And even in those cases where civil proceedings result, not in a payment of money, but in the defendant's being sent to prison, a similar distinction is traceable. For he will be set free as soon as he is willing to do what the court has ordered; civil imprisonment being only "coercive," and not, like criminal imprisonment, "punitive." At first sight, therefore, it may seem to be quite easy to distinguish civil proceedings from criminal ones, by saying that punishment is always the aim of the latter but never the aim of the former. But when we take a more comprehensive view of civil litigation, we find that there are cases in which a part of its object—and indeed others in which the

[1] Austin, *Lectures on Jurisprudence*, pp. 520, 1086.
[2] L.R. 11 P.D. 100.

whole of its object—is to punish. Thus there is a large class of ordinary civil cases, in which "exemplary" damages are permitted[1]. Where, for example, a plaintiff has been assaulted or slandered or defrauded, the jury need not limit the damages to such an amount as suffices to make good his loss; they may also take into account the degree of violence or oppressiveness or malice of which the defendant has been guilty, and give more liberal damages in retribution of it. Thus in a case of assault, as much as £500 damages have been given for knocking off a man's hat, and a higher court has refused to treat the amount as excessive[2]. Moreover that peculiar class of proceedings called penal actions belong, as we have seen, to civil procedure; and yet they exist solely for the purpose of inflicting punishment. When in such an action, an informer recovers a penalty from some one who—for instance—has opened a place of amusement on a Sunday, the money is not exacted because the informer has suffered by the wrong-doing, but only because the community desires to prevent such wrong-doings from being repeated. The law inflicts these penalties from precisely the same motive which leads it to send thieves to gaol or murderers to the gallows. We are brought, then, to the conclusion that, whilst punishment is admittedly the object of all criminal proceedings, it sometimes is the object of civil ones also. If the aim of the legislature, in creating any particular form of litigation, clearly was to punish, this raises a strong probability that the litigation ought to be treated as a criminal proceeding. But it gives us a probability only; and not that positive certainty which a definition requires.

(7) If, however, we pass from the purpose with which (in either case) the unsuccessful defendant is made to undergo some evil, or "sanction," to the differences perceptible between the respective sanctions themselves, a more plausible ground

[1] Pollock on Torts, Bk. I. ch. 5. [2] Cited in 5 Taunton 442.

of distinction is reached. For it may be said that, on the one hand, all civil sanctions, even those of penal actions, directly enrich some *individual* (whether by awarding him money or by securing him the specific performance of some act to which he has a right); whilst criminal sanctions inflict a loss or suffering that never enriches any individual—though occasionally, as in the cases of fines or confiscations, it may enrich the State. This is almost precisely true, but not quite. For amongst the "penal actions" there are some in which no private person can act as informer, the State alone being permitted to sue and recover the penalty; and yet there is high authority for ranking even these as merely civil proceedings[1]. And, conversely, mere civil actions for debt used, in former days, often to end not in enriching the plaintiff, but merely in imprisoning the debtor; for if the defendant had no property out of which the amount for which judgment had been given could be realised, he himself could generally be seized in execution. And even now, although the Debtors' Act 1869[2] has abolished the old matter-of-course imprisonment for debt, yet even under it (sec. 5), if the non-payment of a judgment debt is wilful, the debtor may be committed to prison. Many thousands of such orders of commitment are made every year. Such imprisonment of course is, as we have seen, not punitive but only coercive; for the debtor will be at once released if he consents to pay what he owes.

(8) But a real and salient difference between civil and criminal proceedings may be discovered, if we look at the respective degrees of control exercised over them by the Sovereign; not so much in respect (as we have already said) of their commencement as of their termination. Austin[3] has

[1] See *Att. Gen.* v. *Bradlaugh*, L. R. 14 Q. B. D. 667 (K. S. C. 7); *Att. Gen.* v. *Bowman*, 2 Bos. and Pul. 532.

[2] 32 and 33 Vict. c. 62.

[3] *Lectures on Jurisprudence*, Lect. xxvii.

established that the distinctive attribute of criminal procedure, in all countries, lies really in the fact that "its sanctions are enforced at the discretion of the Sovereign." This does not mean that the Sovereign's permission must be obtained before any criminal proceedings can be taken, but that he can at any time interfere so as to prevent those proceedings from being continued, and can even grant a pardon which will release an offender from all possibility of punishment. Thus the "sanctions," the punishments, of criminal procedure are always remissible by the Crown. Moreover they are not remissible by any private person. Such a person may be the sole victim of the crime, he may even have taken the trouble to commence a prosecution for it, yet these facts will not give him any power of final control over the proceedings; and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney General[1] or even by any private person. Thus in *Rex* v. *Wood*[2] a man had begun a prosecution against the keeper of a gaming house, and employed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer; and subsequently arranged matters with the defendant and dropped the prosecution. Thereupon the original solicitor took it up, and brought it to trial. The former prosecutor protested against this activity, but in vain; the Court of King's Bench insisted that the case must proceed. All this is in striking contrast to the rules of civil procedure, where the party injured usually has an absolute legal power of settling the matter and of remitting the sanction, alike before he has commenced proceedings and after he has commenced them; whilst the Sovereign, on the other hand, has usually no power to inter-

[1] *Rex* v. *Oldfield*, 3 B. and Ad. 657. [2] 3 B. and Ad. 657.

fere, and no pardon granted by him could relieve the offender from his liability to make redress to the injured person.

Austin here has suggested a true principle of demarcation; (though, to avoid including actions for recovery of the Crown's debts or other civil rights, we should add that all criminal sanctions "are imposed with a punitive purpose"). But he suggested it only in general terms; so that, for any particular system of criminal law, some difficulty may arise in expressing it with the completeness locally necessary. Thus in English law two exceptional rules must not be overlooked. One is that the Crown's power of pardon, though nearly universal, is not absolutely so (*infra*, p. 492). For by the common law a public nuisance, whilst still unabated, cannot be pardoned; and by the Habeas Corpus Act, another offence, that of sending a man to prison outside England, is also made unpardonable, lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity. Accordingly the punishment of these two offences is not remissible; (except, of course, by passing a special Act of Parliament, an anomalous interference with the rules of law such as would equally suffice to remit any non-criminal sanction). We must therefore modify Austin, and not say more than that "crimes are wrongs whose sanction is punitive, and is remissible by the Crown, *if remissible at all.*" The other qualification in English law arises from the anomalous character of those penal actions which in this country complicate so artificially the natural boundary between criminal and civil law. Were it not for them, it would be sufficient to say simply, with Austin, that the sanctions of civil procedure are always remissible by the party suing and are never remissible by the Crown (unless it be itself that party). But penal actions have long ceased to be remissible quite freely by the party suing; for 18 Eliz. c. 5 requires him to obtain leave from the court before compromising the action. Moreover they have always

been to some extent remissible by the Crown; for, even at common law, the Crown always had power to give a valid pardon before any informer had commenced an actual suit (though not after he had commenced one and so secured himself a vested interest in the penalty). And under some statutes, like the Lord's Day Act 1875, the power is not terminated even by a suit being brought[1]. Hence, to allow for the peculiarities of this form of civil procedure, we must modify Austin's account of civil wrongs, and say only that a wrong is civil if any power of remitting its sanction can be exercised, whether freely or even under restrictions, by any private person. The Crown may, as we have seen, though only in one rare and peculiar class of cases, have the power of remitting a civil sanction. But no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure (though, as we have seen, the familiar everyday instances of both are characterised by other and more conspicuous, though less essential, distinctions). For the judicial proceedings taken against a wrong-doer may produce a variety of results. There may be:—

1. Civil proceedings producing merely restitution or compensatory damages. Plaintiff is out of pocket by paying his own costs.

2. Civil proceedings producing efficient redress (*i.e.* both damages and also costs). A "documentum[2]" to defendant; but plaintiff is not enriched.

3. Civil proceedings producing exemplary damages. A documentum to defendant, and an actual profit to plaintiff.

4. Civil proceedings in which an informer receives or

[1] See for instance the effect of 38 and 39 Vict. c. 80 in extending the Crown's power of pardoning offences committed against Bishop Porteus' Act (21 Geo. III. c. 49) which restrains the holding of concerts and other public entertainments on Sunday.

[2] *Supra*, p. 11.

shares the penalty. A documentum to defendant, and an actual profit to plaintiff.

5. Civil proceedings in which the Crown receives all the penalty[1]. A documentum to defendant, but a profit to the State alone.

6. Criminal proceedings. A documentum to the defendant; either a profit to the State alone, or, more usually, no profit even to it.

In recent years the question as to the dividing line between civil and criminal proceedings has assumed great practical importance, and has occupied the attention of the English courts with unusual frequency. For many controversies have arisen under the Judicature Act 1873, which when creating a general Court of Appeal for *civil* cases, still retained (by s. 47) the rule that (except in the rare case of a writ of error) "No appeal shall lie from the High Court in any criminal cause or matter."

In dealing with these cases, the courts have recognised that a charge may be criminal even though it be too trivial to be tried by a jury or visited with imprisonment. Thus it is a "crime" not to send your child to school[2]; though it cannot be prosecuted in any higher tribunal than a police-magistrate's, and the utmost possible punishment for it is a fine of a sovereign. Similarly they have recognised that conduct may be criminal without involving any moral turpitude; as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members[3]. Up to the present time, they have found it a practically sufficient test to inquire whether the object of the proceedings is punitive or not. They regard any proceedings as "criminal" which may terminate in the infliction of

[1] On the question as to whether these are rightly classed as civil, see *Att. Gen.* v. *Riddell*, 2 Tyr. 523, 2 C. and J. 493; *Att. Gen.* v. *Radloff*, 10 Exch. 84; *Att. Gen.* v. *Bradlaugh*, L. R. 14 Q. B. D. 667 (K. S. C. 7).

[2] *Mellor* v. *Denham*, L. R. 5 Q. B. D. 467.

[3] 25 and 26 Vict. c. 89, s. 26.

a penalty; even though that penalty be merely a pecuniary fine, and even though this fine be not inevitable but only alternative. Thus proceedings were held to be criminal because in them the defendant might have been ordered either to pay a fine or to abate the nuisance complained of; although in fact only the abatement was ordered, so that no fine was imposed[1]. For, as we have already seen, proceedings which are not punitive cannot be criminal, and proceedings which are civil are very seldom punitive; so that in the vast majority of cases this simple and obvious test, the punitiveness or nonpunitiveness, will suggest an accurate answer to the question as to who has the legal power of remitting the sanction[2]. But it is, as we have seen, upon this last and fundamental question that the criminal or civil character of the proceedings finally depends.

Inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure if it like. And, in this very way, the distinction between civil wrongs and crimes was formerly much obscured in England, when our civil courts were allowed to try "Appeals of Felony[3]." The sole object of such a proceeding was to inflict capital punishment upon a man guilty of heinous crime. Yet the proceeding was taken in a civil court; and was conducted by civil rules of procedure, (the accused, for example, being defended by counsel, who would not have been allowed to him in a

[1] *Reg.* v. *Whitchurch*, L. R. 7 Q. B. D. 534.

[2] *E.g.* if a commitment for contempt of court was meant to be a punitive one, the Sovereign (or similarly a colonial governor acting on his behalf) can release the offender. *Moseley's Case*, L. R. [1893] A. C. 138.

[3] 4 Blackstone 378. 'Appeal' here means merely 'summons,' and has no connexion with the modern idea of 'appealing' from a lower court to a higher.

criminal court); and whilst it might be compromised by the plaintiff, it could not be defeated by any pardon from the Crown. This anomalous remedy was not formally abolished until 1819; and in 1818 in the case of *Ashford* v. *Thornton*[1], an accuser actually instituted an "Appeal." Even then the abolition was resisted by some of the most progressive politicians; on the ground that such proceedings afforded the only sure means by which over-zealous soldiers or constables, who had acted with an illegal excess of violence, could be brought to punishment without the possibility of their being shielded by the Crown. From this point of view, no less eminent a judge than Lord Holt had eulogised Appeals as "a true badge of English liberty."

But, though Appeals have been abolished, it still remains possible that the same wrongful act may be followed up by both civil and criminal proceedings. For almost every crime admits of being treated as a "tort," *i.e.* as a civil injury, so that the person wronged by it can sue the wrong-doer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a private injury[2]; but of course this cannot be the case with those offences which do not happen to injure any particular private individual. Of such offences there are three groups. There are the cases in which a crime affects the State alone, as where a man publishes a seditious libel or enlists recruits for the service of some foreign belligerent. Again, there are the cases in which, though the crime is aimed against a private individual, its course is checked before it has reached the point of doing any actual harm; as where an intending forger is charged only with "having in his possession a block for the purpose of forging a trade-mark," or with possessing bank-note paper without lawful excuse, or with engraving a bank-note plate without lawful excuse. And, thirdly, there are cases in which, though a private individual does actually

[1] 1 B. and Ald. 423. [2] 4 Bl. Comm. 5.

suffer by the offence, yet this sufferer is no other than the actual criminal (who, of course, cannot claim compensation from himself); as in cases of attempted suicide, or of a man's making a "forcible entry" into his own house, or (under 34 and 35 Vict. c. 108) of a tramp's "wilfully destroying" his own clothes whilst receiving shelter in the casual ward of a workhouse.

In, however, the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other man; and whenever this is so, the crime is also a tort. But though most criminals are thus liable to be sued, in civil proceedings, for pecuniary compensation for the harm which they have done, such proceedings are rarely brought; for most crimes are committed by persons so poor that no compensation could be obtained from them. Hence libel and assault, since they are the crimes least unlikely to be committed by rich people, are the only crimes for which a resort to civil proceedings is at all common in practice; but they are very far from being (as is sometimes hastily inferred) the only crimes where it is possible. Thus a case occurred in Ireland, a few years ago, in which the victim of a rape brought an action for damages against her ravisher[1]; and, in like manner, the circumstances which give rise to a prosecution for bigamy would often support civil proceedings for the tort of Deceit. Criminal wrongs and civil wrongs, then, are not sharply separated groups of acts, but are often one and the same act as viewed from different standpoints; the difference being one not of nature but only of relation. To ask concerning any occurrence, "Is this a crime or is it a tort?" is—to borrow Sir James Stephen's apt illustration—no wiser than it would be to ask concerning a man, "Is he a father or a brother?" For he may well be both.

If we know any particular occurrence to be a crime, it is

[1] *S.* v. *S.*, 16 Cox 566.

easy—as we have seen—to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalisation that Torts have been erected into crimes whenever the law-making power had come to regard the mere civil remedy for them as being inadequate. Inadequate it may have been on account of their great immorality, or of their great hurtfulness to the community, or of the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor to pay pecuniary damages. The easiness of the legal transition from tort to crime is vividly illustrated by the ancient Norman custom of the "Clameur de Haro," still surviving in our Channel Islands, by which a person who is suffering from a tort may cause any further continuance of that tort to become an actual crime, by merely uttering, in the wrongdoer's presence, an archaic invocation of the protection of Duke Rollo[1].

By a paradox, familiar to all readers of Sir Henry Maine's *Ancient Law*, the codes of archaic civilisations may equally well be described as utterly ignoring crime or as being mainly occupied with it. For whilst the chief task of a primitive lawgiver is to cope with those acts of serious violence which mature civilisations repress by criminal punishment, yet his only means of coping with them is by exacting the claims of the private individuals who have been injured. The idea of repressing them by a further sanction, imposed in the collective interests of the community, is not reached until a late stage of legal development. The process of evolution may sometimes be traced through successive periods. In the earliest, which even Homer had not out-

[1] See M. Glasson's article on the Clameur, in *La Grande Encyclopédie*.

grown, not only are crimes treated as mere private wrongs, but the amount of redress, and sometimes even the mode of redress, are left to the discretion of the injured person or his relatives. Even the Mosaic legislation left this primitive Bedouin rule in force for every homicide that was wilful, and bade the elders of the murderer's own city "fetch him and deliver him into the hands of the Avenger of Blood" (Deut. xix. 12). Even within the present century popular sentiment in Corsica recognised these vendettas as permissible, if not even obligatory. A modern (1899) traveller in Abyssinia found the law of murder there to be, even yet, that "the relations of the murdered man have the legal right to put the murderer to death by whatever means he employed towards their kinsman; or they may, if they prefer, accept a money payment instead." A decided advance in civilisation is made when the penalty of any given class of crimes is specified and limited; a fine of sheep or cattle, it may be. The injured persons still retain the privilege of exacting it, but it is all that they can exact. A good instance is that law ascribed to Numa Pompilius which mitigated in this way the vengeance for mere manslaughter: "Si quis occidisset hominem, pro capite occisi agnatis ejus in concione offeret arietem[1]." And, nearer home, a more familiar instance may be found in the Anglo-Saxon wér-gild, claimable by the kinsmen of a murdered man, and nicely graduated according to his status; twelve hundred shillings for a thegn, but only two hundred for a villein, and forty for a slave, and less for a Welshman than for a Saxon[2]. Later on, again, it comes to be perceived that when one member suffers the community suffer; and hence that a compensatory expiation is due not only to the victim and his kindred but also to the State. So perhaps a fine is exacted on behalf

[1] Clark's *Early Roman Law*, 44—50.

[2] Pollock and Maitland's *Hist. Eng. Law*, I. 26, II. 448. Maitland's *Domesday Book*, p. 81.

of the community, either in addition to or instead of the private one; and probably some person is specified who shall exact it. The fourth and final stage of the process[1] is reached when the State realises that her interest in the preservation of order is so great that she must no longer remain content with saying that those who violate order shall afterwards make her a reparation; she must now deter them by threats from committing any such violation. The idea of a true *punishment* is thus made to supersede all idea of compensation to the community. It overshadows even the idea of compensation to the injured; though for some time the consent of the injured may perhaps be thought necessary, at the outset of prosecutions, to enable the public punishment to take precedence of the private penalty or supersede it. (Traces of that conception are traceable even now in our own English criminal courts when, in dealing with some slight offence, they mitigate the punishment "because the prosecutor does not press the case," or they even give him leave to settle the matter and withdraw the prosecution.) A good example of the introduction of true punishment is afforded by the law, attributed to Numa Pompilius, which punished murder: "Si quis hominem liberum dolo sciens morti dedit, paricidas esto[2]." But no additional example is afforded by early Roman legislation, even when we come down to the XII Tables; unless it be in the penalty of retaliation for a "membrum ruptum," and even this was perhaps regarded by the lawgivers rather as a source of gratification to the party originally maimed, than as a punishment by which the State sought to deter men from maiming its citizens. In like manner, the English conquerors of Ireland superseded the ancient fines for homicide by the punishment of death. They pronounced those Brehon fines to be "contrary both to God's law and man's"; yet it

[1] The stages of evolution are well illustrated in the Babylonian code of Hammurabi; see Mr Johns' cheap and excellent translation.

[2] Clark's *Early Roman Law*, loc. cit.

was only late in the twelfth century that such fines had been superseded in their own England[1]. Punishments thus instituted in the interests of the State would at first be imposed by direct action of the State itself or its delegate; thus at Rome each sentence was pronounced by a special lex of the great national assembly, the Comitia. As time went on, the function of administering criminal justice would come to be delegated to representatives. Sir Henry Maine[2] has shewn how, in the typical case of Rome, the Comitia came to delegate criminal cases, one by one, each to a special committee (quaestio), nominated for the particular occasion; and later on, to adopt the practice of appointing these quaestiones for a period, with power to try all cases, of a given class, that might arise during that time; whilst, ultimately, they were appointed permanently, as true forensic Courts.

Even in England the process of turning private wrongs into public ones is not yet complete; but goes forward year by year, whenever any class of private wrong—or even of acts that have never yet been treated as wrongs at all—comes to inspire the community with new apprehension either on account of its unusual frequency or of some new discovery of its ill effects. Thus it was not until Hanoverian reigns that the maiming or killing of another man's cattle, or the burning of his standing corn, were made crimes; though they were wrongs as injurious to the owner as theft, and to the community still more injurious than theft. It was not until 1857 that it was made a crime for a trustee to commit a breach of trust[3]; and not until 1868 that it was made a crime for a partner to steal the partnership property[4]. Every year sees Parliament create some new crime[5]; though, in most cases, of a character much more trivial than such instances as those just now quoted. Probably the multipli-

[1] Pollock and Maitland, II. 458.

[2] *Ancient Law*, ch. x.

[3] 20 and 21 Vict. c. 54.

[4] 31 and 32 Vict. c. 116.

[5] Cf. the Prevention of Corruption Act, 1906, making criminal certain acts of bribing commercial agents; and the Musical Copyright Act, 1906.

cation of crimes would have gone on even more rapidly than it has done, but for the fact that various forms of misconduct, which otherwise would naturally have come to be restrained by criminal prohibitions, were already under an adequate deterrent sanction in the shape of some abnormal form of civil proceedings, such as an action for "exemplary damages[1]," or, again, for a penalty recoverable by the first informer[2].

[1] *Supra*, p. 12. [2] *Supra*, p. 7.

CHAPTER II.

THE PURPOSE OF CRIMINAL PUNISHMENT.

THE inquiry will naturally suggest itself; Under what circumstances does it become wise thus to issue a new criminal prohibition? All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which, whether from selfish or from philanthropic motives, they desire to see repressed. But Bentham[1] has vividly shewn that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question does really injure his subjects. Before using threats of criminal penalties to suppress a noxious form of conduct, the legislator should satisfy himself upon no fewer than six points:

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct and indirect, which the infliction of criminal punishment necessarily involves. Hence he will not make a crime of mere Lying; unless it has caused a pecuniary loss to the deceived person and thereby become aggravated into Fraud.

2. It should admit of being defined with legal precision. On this ground, such vices as ingratitude, or extravagance, or gluttony (unlike drunkenness), do not admit of being punished criminally.

[1] Cf. Bentham's *Principles of Morals and Legislation*, chap. xv.; and his *Principles of Penal Law*, II. 1. 4.

3. It should admit of being proved by cogent evidence. The untrustworthiness of the only available evidence has been one great cause of the reluctance of experienced legislators to deal criminally with offences that are purely mental, like heresy and conspiracy and the "compassing" of treason; and even with those which consist of merely oral utterances, like slander.

4. Moreover this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence in England, the criminal law does not punish drunkenness, except when it is detected in a "public place."

5. And even if an offence is found to satisfy all these intrinsic conditions of illegality, the lawgiver should not prohibit it, until he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibition would impose; just as in England at the present time, it is really by public sentiment, and not by the unpopular Lord's Day Act of Charles II, that our habitual abstinence from trade and labour on Sundays is secured. Or, on the other hand,—as has sometimes been shewn by prosecutions, under the same statute, of bakers and crossing-sweepers for pursuing their callings on Sundays—public opinion may regard an offence so leniently that the fact of a man's having to undergo legal penalties for it, would only serve to secure him such a widespread sympathy as would countervail the deterrent effect of the punishment. To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law; but it is a function which must be discharged slowly and cautiously. For attempts at a rapid and premature elevation are apt, as in the case of the Puritan legislation of the Cromwellian period, to provoke a reaction

which defeats their aim. An admirable illustration of the caution which a wise legislator exercises in undertaking the tasks that moral reformers commend to him, is afforded by the English law of sexual offences (p. 143). It does not inflict criminal penalties upon all those acts which the ecclesiastical law prohibits and used to punish, and which the law of contract still visits fitly with the sanction of Nullity. It selects out of them, for criminal prohibition, those alone in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6. Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by the milder sanctions which civil courts can wield.

Hence breaches of contract have rarely been criminally dealt with. For, even when intentional, they are seldom accompanied by any great degree of wickedness or any great public risk; or by any great temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair. It has, however, been made a crime for a workman to break his contract of service whenever the probable consequences will be to endanger life or to expose valuable property to serious injury; (38 and 39 Vict. c. 36). Again, violations of the rights of property, whenever they are merely unintentional, are usually sufficiently restrained by the fear of a mere civil sanction, viz. the payment to the injured person of a sum of money co-exten-

sive with the loss that has been inflicted, and of a further sum towards the "costs" which he has incurred by the litigation. But there are other forms of wrong-doing upon which the fear of damages and costs, or even of such mild forms of imprisonment as a civil court can inflict for breach of any injunction which it has laid upon a defendant, do not impose an adequate restraint. Thus the case may be one in which the offender belongs to a class too poor to have the means of paying pecuniary compensation. Or the harm done to the immediate victim of the crime may be such that it cannot be redressed by pecuniary compensation; as in the case of murder. Or, as is far more commonly the case, the gravity of the offence, or the strength of the temptation to it, may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is, beyond the immediate and direct victim who has been robbed or wounded, an unknown group of "indirect" sufferers; who, if only because they are unascertainable, cannot have pecuniary compensation given them for the suffering that has been caused to them. In such cases the lawgiver must adopt some more stringent remedy. He may, for instance, take precautions for securing some Antecedent interference which will check the wrong-doer at the incipient manifestations of his criminal purpose; interference such as our Saxon ancestors attempted to provide by their system of Frankpledge, which made it the direct interest of a man's neighbours to keep him from crime, and as Sir Robert Peel provided in the nineteenth century when he secured the establishment of the vigilant force of policemen with whom even the current slang of the streets still associates his two names. Or he may adopt the easier and more common, but less effective, method of a Retrospective interference; by holding out threats that, whenever a wrong has been actually committed, the wrong-doer shall incur punishment.

To check an offence by thus associating with the idea

of it a deterrent sense of Terror, is possible only when both of two conditions are present. For (1) the wrong-doer must know he is doing wrong; for otherwise a terror would not affect him, and so not deter. It is on this ground that immunity from punishment is conceded to a man who has taken another's property by mistake for his own, or has committed a murder in a fit of insanity. Nor does it suffice that he knows that what he is doing is wrong, unless also (2) he can 'help' doing wrong: for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding; since the fear of punishment could not have the effect of making him avoid them. Hence comes the reluctance which lawgivers have often shewn to punish men who have been coerced by threats of death to aid in a rebellion, or who have been hurried into a theft by some kleptomaniacal impulse. When these two conditions are satisfied, so that the restraint of Terror becomes justifiable, such a restraint is supplied by criminal law very efficiently. For, as we have already seen in our review of the peculiarities which seem to distinguish criminal procedure from civil, the former exposes the offender to more numerous hazards of having litigation instituted against him, as well as to far severer "sanctions" in case of that litigation succeeding; and, at the same time, it diminishes his chances of having these penalties remitted.

According to the most generally accepted writers—as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach—this hope of preventing the repetition of the offence is not only a main object, but the sole permissible object, of inflicting a criminal punishment. Hence Abp. Whately vividly says, "Every instance of the infliction of a punishment is an instance of the failure of that punishment"; for it is a case in which the threat of it has not proved perfectly deterrent. Whately here embodies an important truth; which had been exaggerated by Whichcote into the over-

statement that "The execution of malefactors is no more to the credit of rulers than the death of patients is to the credit of physicians." But, whereas the death of one patient never constitutes any step towards the cure of others, the execution of a man, whom the fear of punishment has not deterred from murder, may nevertheless help to deter others. Hence there was sound logic in the often-derided exclamation of the shipwrecked crew who, when they saw a gibbet on the beach where they were washed ashore, cried "Thank God, we've reached a civilised country!"

Criminal punishment may effect the prevention of crimes in at least three different ways.

(*a*) It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence; as by imprisoning him, or by putting him to death.

(*b*) It may act on the offender's mind; counteracting his criminal habits by the terror it inspires, or even eradicating them by training him to habits of industry and a sense of duty. The improvements in prison-management which, mainly under the influence of Howard's initiative, have been carried out during the past century and a quarter, have been largely directed towards the development of the educational influences that can be thus attempted during imprisonment. There are indeed some criminologists, especially in America, who hold this reformation of the individual punished to be the only legitimate object of punishment—an extreme view which denies to the State so simple and obvious a right as that of self-preservation.

(*c*) It may, in addition, act on the minds of others, if only in one of the ways in which it may act on his mind; for, though it cannot amend them by education, it may at least deter them by fear. It is in this way that pecuniary penalties help to prevent crime, though incapable of preventing it either in mode (*a*) or as an educative influence.

But beyond this paramount and universally admitted object of punishment, the prevention of crime, it may be questioned whether there are not two further purposes which the legislator may legitimately desire to attain as results though only minor results, of punishment.

One of these—distasteful as is the suggestion of it to the great majority of modern writers—is the gratification of the feelings of the persons injured. In early law this was undoubtedly an object, often indeed the paramount object, of punishment[1]. Even in Imperial Rome, hanging in chains was regarded as a satisfaction to the kindred of the injured, "ut sit solatio cognatis"; and even in England, so recently as 1741, a royal order was made for a hanging in chains "on petition of the relations of the deceased[2]." The current morality of modern days generally views these feelings of resentment with disapproval. Yet some eminent Utilitarians, like Bentham, (and not without support from even so dissimilar a writer as Bishop Butler[3]), have considered them not unworthy of having formal legal provision made for their gratification. Hence no less recent and no less eminent a jurist than Sir James Stephen maintains that criminal procedure may justly be regarded as being to resentment what marriage is to affection:—the legal provision for an inevitable impulse of human nature. And a very general, if an unconscious, recognition of this view may be found in the common judicial practice, in minor offences, of giving a lighter sentence whenever the prosecutor "does not press the case": and again, in the widespread reluctance to punish crimes that are not prosecuted until several years after their commission. The modern community, like those ancient ones which Maine depicts[4], measures here its own public vengeance by the resentment which the victim of the crime entertains. The

[1] Holmes, *Common Law*, p. 34. [2] Prof. Amos' *Ruins of Time*, p. 23.

[3] *Sermons at the Rolls Chapel*, VIII. and IX., cf. Henry Sidgwick's *Lectures on Ethics*, p. 357. [4] *Ancient Law*, ch. X.

same impulse occasionally reveals itself, in the "Lynch law" of the Southern United States, when the mob that condemns a negro ravisher to the flames directs the outraged woman herself to kindle the first torch.

There is a second subsidiary purpose of Punishment, which, though not so distasteful as the foregoing one, is almost equally often ignored by modern jurists. This consists in the effects of Punishment in elevating the moral feelings of the community at large. For men's knowledge that a wrong-doer has been detected, and punished, gratifies—and thereby strengthens—their disinterested feelings of moral indignation. They feel, as Hegel has it, that "wrong negatives right, but punishment negatives the negation." Mediæval law brought into great prominence this effect of punishment. For more than a century past, the tendency of jurists has been to disregard it; but it occupies a large place in the judgment of ordinary men. It has full recognition from practical lawyers so eminent as Sir Edward Fry[1], Mr Justice Wright[2], and Mr Justice Kennedy[3]. As Professor Sidgwick testifies:—"We have long outgrown the stage at which the normal reparation given to the injured consisted in retribution inflicted on the wrong-doer. It was once thought as clearly right to requite injuries as to repay benefits; but Socrates and Plato repudiated this, and said that it could never be right to harm anyone, however he may have harmed us. Yet though we accept this view of Individual resentment, we seem to keep the older view when the resentment is universalised, *i.e.*, in Criminal Justice. For the principle that punishment should be merely deterrent and reformatory is, I think, too purely utilitarian for current opinion. That opinion seems still to incline to the view that a man who has done wrong *ought* to suffer pain in return, even if no benefit result to him or to others from the pain; and that

[1] *Studies by the Way*, pp. 40—71. Cf. *Nineteenth Century*, 1902, p. 848.
[2] *Draft Jamaica Criminal Code*, p. 129. [3] *Law Magazine*, Nov. 1899.

justice requires this; although the individual wronged ought not to seek or desire to inflict the pain[1]." (It may however be doubted whether any such qualification as that contained in the last fourteen words is really imposed by current opinion.)

The view of most people who are not lawyers is thus much the same as that maintained by no less a philosopher than Victor Cousin, in his terse epigram[2] that "punishment is not just because it deters, but it deters because it is felt to be just." They hold with Lord Justice Fry that "the object of punishment is to adjust the suffering to the sin."

And accepted judicial practice, when carefully examined, contains much to corroborate this view, and to shew that Prevention is not the sole object of punishment. For were it so, then (1) an absolutely hardened and incorrigible offender ought to go scot-free, instead of being the most severely punished of all[3]. So that in a community utterly defiant of the law—as in that period of modern Irish history which Lord Beaconsfield has described or imagined, when "the iron discipline of the armed constabulary rather avenged outrage than secured order"—such discipline ought to be altogether abandoned as useless. Moreover, if prevention be all, then (2) we should have to consider force of Temptation as being usually reason for increasing the punishment; yet judges have generally made it a ground of extenuation, as when a thief pleads that he stole to satisfy his hunger, or a slayer that he struck under the provocation of a blow. And (3) on the other hand, by a divergence in the opposite direction,

[1] *Methods of Ethics*, p. 280.

[2] Preface to the *Gorgias* of Plato.

[3] Thus a very late writer (Dr G. V. Poore, *Medical Jurisprudence*, p. 324, ed. 1901) expressly maintains that "In the case of young offenders, one should make an example of them;...but when we deal with a hardened sinner...the sooner we banish from our minds any idea of vengeance the better." To most persons this will appear a precise inversion of the proper contrast.

the reluctance with which English law admits Duress by any threats to be an excuse for a crime committed by the intimidated agent, and its modern refusal[1] to treat Necessity as an excuse for homicide, even in the extreme case of a starving crew of shipwrecked men, shew again that deterrence cannot be the sole object of punishment; for punishment is thus inflicted where the fear of it could not have sufficed to deter. Indeed the sense of Ethical Retribution seems to play a part even in non-criminal law; for if, in some action of debt or trespass, the judge, in order to save himself trouble by shortening the suit, should offer to pay the plaintiff the damages out of his own pocket, an ordinary plaintiff would feel dissatisfied. Vivid proofs of the influence formerly exercised on criminal law by this idea of Ethical Retribution, may be found in the fact that it sometimes drove the tribunals into the illogical excess of punishing, from mere blind association of ideas, "crimes" committed by non-ethical agents. Instances occur in the mediæval punishments sometimes inflicted on animals; and in the "piacularity" attached in ancient Greece to even inanimate instruments of death, as when, according to Pausanias, the Prytanes at Athens condemned to penal destruction lifeless objects that had accidentally slain a man[2]—a feeling which reappears in the "Deodand" of the old English law of Homicide[3]. The same unreasoning association of ideas induced so modern a statesman as Windham to urge in Parliament (July 11, 1800) that even criminals who were insane should nevertheless be punished "for example's sake."

On the other hand, the fact that temptation does not always extenuate, inasmuch as in some classes of offences (especially political and military ones) lawgivers often make it a reason for threatening a graver punishment, shews that the principle of Ethical Retribution is not the only one

[1] In *Reg.* v. *Dudley and Stephens*, L. R. 14 Q. B. D. 273.
[2] *Itinerary*, Bk. I. c. 28, s. 11. [3] *Infra*, p. 107.

that guides them, and that they take account also of the necessity of Prevention. A further proof may be found in the comparatively severe punishment inflicted on criminals who through mere negligence (*e.g.*, a careless engine-driver), or through intoxication (*e.g.*, a mother overlaying a child in drunken sleep), so that the purely ethical blame is small, have caused some fatal injury. The same lesson is taught, too, on the other hand, by some cases where the divergence from mere Ethics is in the opposite direction; as in the English rules that mere Intention to commit a crime is never punished, and that even the Attempt to commit it is punished but slightly. For in either case the ethical guilt may be just as great as if the guilty scheme had not happened to become frustrated[1].

It cannot however be said that the theories of criminal Punishment current amongst either our judges or our legislators have assumed, even at the present day, either a coherent or even a stable form[2]. To this, in part, is due the fact that—as will be shewn in the concluding chapter of this volume—our practical methods of applying punishment are themselves still in a stage which can only be regarded as one of experiment and transition.

[1] In French law, an attempt to commit any grave crime, which has miscarried "only through circumstances independent of the criminal's own will," is punishable as severely as the consummated offence. *Code Pénal*, art. 2.

[2] The student should refer to the discussion of the Purposes of Punishment in Salmond's *Jurisprudence*, ed. 1907, ss. 28—31.

CHAPTER III.

THE MENTAL ELEMENT IN CRIME.

We have already seen how closely the idea of moral Wickedness is interwoven with that of legal crime; and also (p. 30) how deterrence is dependent upon certain conditions of Mind. Hence to constitute a crime and subject the offender to a liability to punishment, *i.e.*, to produce legal criminal "guilt" (or, in Austin's terminology "imputability"), a mental as well as a physical element is necessary[1]. Thus, to use a maxim (which has been familiar to English lawyers for nearly eight hundred years), "*Actus non facit reum nisi mens sit rea*[2]." Accordingly, every crime involves:—

(1) A particular physical condition. Blackstone calls it "a vicious act[3]." As, however, it may consist of *in*action the term "vicious conduct" would be more appropriate.

(2) A particular *mental* condition causing this physical condition. Blackstone calls it "a vicious will[4]." It is not, however, a "will" in Austin's sense of that word; but is closely akin to, and includes, his "Intention."

In Ethics, of course, this second condition would of itself, suffice to constitute guilt. Hence[5] on Garrick's declaring

[1] See Austin's *Lectures on Jurisprudence*, xviii., xxvi.; Clark's *Analysis of Criminal Liability*; Stephen's *General View of the Criminal Law*, ch. III.; Stephen's *Hist. Cr. Law*, II. 94—123.

[2] Professor Maitland has traced the use of this aphorism in England back to the *Leges Henrici Primi*, v. 28, and its origin to an echo of some words of St Augustine, who says of Perjury "ream linguam non facti nisi mens rea." *Hist. Eng. Law*, II. 475.

[3] 4 Bl. Comm. 21. [4] *Ibid.* [5] Boswell, *anno* 1783.

that whenever he acted Richard III he felt like a murderer, Dr Johnson, as a moral philosopher, retorted, "Then he ought to be hanged whenever he acts it." But there is no such searching severity in the rules of Law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct. So a merely mental condition is practically never made a crime. If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime. It is true that there appears at first sight to be an important exception to this principle, in that form of High Treason called "compassing the King's death[1]." But the exception is only apparent; for the Statute of Treasons goes on to make it essential to a conviction that some "overt act" should have been committed towards accomplishing the end contemplated. In another apparent exception, the misdemeanor of Conspiracy[2], it is true that the Conspiracy itself is a purely mental state—the mere agreement of two men's minds—and that here, unlike Treason, it is not necessary to a conviction that any act should have been done towards carrying out the agreement; but it would be impossible for two men to come to an agreement without communicating to each other their common intentions by speech or gesture, and thus even in conspiracy a physical act is always present. Hence conspiracies are amongst the commonest instances of the "overt acts" relied upon in charges of Treason.

A still greater divergence from Ethics will be remarked, if we turn from the criminal to the non-criminal branches of Law; for they often inflict their sanctions on mere external conduct, which is not the result of any blameable state of mind. Thus,

(1) In breaches of Contract, the mental and moral

[1] *Infra*, p. 265; Stephen, *Digest of Criminal Law*, Art. 52, 53.

[2] *Infra*, p. 287; Stephen, *Digest of Criminal Law*, Art. 49.

condition of the defaulter has no effect upon the question of his liability or non-liability[1]; unless the very language of the contract implies that it can only be broken by some act which is wilful. Thus a wife's covenant in a separation deed "not to molest" her husband, is held not to be broken by anything but an intentional annoying of him. And, similarly, if the defaulter be liable, the wilfulness or wickedness of his conduct will not affect the amount of the damages to be recovered from him; (except in the case of a breach of promise to marry).

(2) And in Torts the mental condition of the wrong-doer is ignored very largely. But not so nearly universally as in the law of Contract; for there are a few classes of tort (*e.g.*, malicious prosecution) in which it is an indispensable element of liability[2]; and in very many[3] (if not, indeed, in all[4]) of the remaining classes, namely the torts in which liability can exist without it, it still may be taken into account in estimating the amount of the damages.

But in Criminal law, as we have seen, no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it has been produced by some form or other of *mens rea*. It is not, however, necessary that the offender should have intended to commit the particular crime which he has committed; (indeed not even that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed as consisting simply in "intending to do what you know to be illegal[5]." It admits, however, of a minuter description. Thus, in the scientific analysis given by Professor E. C. Clark[6], it is shewn to

[1] Anson on Contracts, Part v. ch. III. s. 3.

[2] Pollock on Torts, ch. II.

[3] *Ibid.* ch. v.

[4] Addison on Torts, ch. III.

[5] *i.e.* what you know to belong to a class of conduct that is (*whether you know it or not*) forbidden by law.

[6] *Analysis of Criminal Liability*, pp. 80, 109. Cf. the analysis made by

require:—

(1) The power of *Volition*; *i.e.*, the offender must be able to "help doing" what he does. This faculty is absent in persons who are asleep, or are subject to physical compulsion or to duress by threats, or whose conduct is due to accident or ignorance; and it is also absent in *some* cases of insanity, of drunkenness, and of infancy. Where it is absent, an immunity from criminal punishment will consequently arise.

(2) *Knowledge* that what the offender is doing is criminal; either intrinsically, or, at any rate, in prospect of such consequences as he has grounds for foreseeing. There will be an absence of such knowledge in very early infancy, or in the case of some delusions as to the supernatural; and immunity, accordingly, will arise.

(3) In such crimes as consist of conduct that is not intrinsically unlawful, but becomes criminal only when certain consequences ensue, there must further be the power of *Foreseeing* these consequences. It is sufficient that he merely had this power, *i.e.*, that he would have expected these consequences had he but paid proper attention to his surroundings; but if this be all, he will usually be placed by criminal law in a position of only minor liability. But, if on the other hand, he actually foresaw them (still more, if he both foresaw and desired them, *i.e.*, in Bentham's phrase, intended them "directly"), the law will probably impose on him a major liability. The power of foresight may be absent in infancy, even in late infancy; and in some forms of insanity.

It might seem that a rule thus rendering the existence of a complex mental element necessary to create legal liability, would usually cause a prosecutor much difficulty in obtaining evidence of it. For, to borrow the saying of a mediæval

Sir James Stephen in his *History of Criminal Law*, II. ch. XVIII., and his *General View of the Criminal Law*, 1st ed. ch. III., 2nd ed. ch. V.

judge[1], which Sir Frederick Pollock has made familiar to modern readers, "the thought of man is not triable, for the Devil himself knoweth not the thought of man[1]." But this difficulty seldom arises in practice; for in most cases the law regards the criminal act itself as sufficient *primâ facie* proof of the presence of this *mens rea.* Every sane adult is presumed to intend the natural consequences of his conduct[2].

We have seen that criminal liability may exist although the offender had no intention to commit the particular crime which he did in fact commit, and that an intention to commit any crime, whatever one it may have been, will suffice. It should now be added that it is probable that the law must be understood as carrying its prohibitions even further than this, and permitting a still slighter degree of *mens rea* to suffice, viz. an intention to commit some act that is *wrong,* even though it do not amount to a crime. But, even if this be so, a further question will arise as to what standard of right and wrong is to be referred to—must the intended act be a breach of Law, or will it be sufficient that the accepted rules of Morality forbid it? These doubts were discussed in the elaborately considered case of *Reg.* v. *Prince*[3], which deserves the most careful attention of the student. There it was expressly held by Brett, J. (afterwards Lord Esher, M.R.), that to constitute criminal *mens rea* there must always be an intent to commit some *criminal* offence. The majority of the court, however, decided that, upon the construction of the particular statute under which the prisoner Prince was indicted, his conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. But here their agreement ended. One of them, Denman, J., was clearly of opinion that an intention to do

[1] Brian, C. J., Y. B. 17 Edw. IV. p. 1.

[2] *Rex* v. *Sheppard,* R. and R. 169 (K. S. C. 468)

[3] L. R. 2 C. C. R. 154 (K. S. C. 21).

anything that was legally wrong at all, even though it were no crime but only a tort, would be a sufficient *mens rea*[1]. And seven other judges, including Bramwell, B., appear to have gone still further, and taken a third view, according to which there is a sufficient *mens rea* wherever there is an intention to do anything that is *morally* wrong, even though it be quite innocent legally. If this last opinion be correct, the rule as to *mens rea* will simply be that any man who does any act which he knows to be immoral must take the risk of its turning out, in fact, to be also criminal But such a doctrine (even if it be right to construe the language of these seven judges as maintaining it) must be considered highly questionable in view of the observations of Cave, J., and Stephen, J., in *Reg.* v. *Tolson*[2] and of the express decision in *Reg.* v. *Hibbert*[3] which none of the judges who decided *Reg.* v. *Prince* seem to have wished to overrule. A further argument against holding the intention of doing a merely moral wrong to be a sufficient *mens rea* is that in *McNaughten's Case*[4] the judges, in defining the *mens rea* required in insane criminals, were careful to speak only of "knowing[5] that his act was contrary to the law of the land."

Hitherto we have spoken only of the degree of *mens rea* required in the general run of crimes. But there are also crimes (usually grave ones) in which a higher degree is necessary. And, on the other hand, there are some (usually of a petty character) in which a less degree than the ordinary one will suffice. Let us proceed to consider these two extremes.

A more complex and special (and therefore more guilty) state of mind than the usual *mens rea* is required for some particular crimes, sometimes by the common law—as in

[1] L. R. 2 C. C. R. at p. 179 (K. S. C. at p. 26).
[2] L. R. 23 Q. B. D. at pp. 182, 190 (K. S. C. at p. 19).
[3] L. R. 1 C. C. R. 184.
[4] 10 Cl. and F. 200 (K. S. C. 43). *Infra*, p. 5[illegible].
[5] *Supra*, p. 39, n. 5, this phrase is explained.

the case of murder, what is technically called "malice aforethought" being there necessary—and sometimes by statute, as in the cases of wounding "with intent to disfigure," and of wounding "with intent to do grievous bodily harm." (But with regard to statutory crimes it should here be noted that although the definitions of them often contain words specifying some mental condition—such as "knowingly," "maliciously," "wilfully," "negligently," "fraudulently"—yet words so general seldom add in any way to the degree of *mens rea* requisite[1]. Usually, they merely alter the burden of proof with regard to it. Their sole effect is to throw on the Crown the obligation of proving the ordinary *mens rea* by further evidence than that mere inference from the *actus reus* which, as we have already seen, is ordinarily sufficient to prove it. Such evidence may consist, for instance, in expressions of vindictive feeling, or in previous injurious acts nearly identical with the present one; thus negativing the probability of accident or carelessness or ignorance[2].)

Conversely, it is hardly ever by the common law, but only by statutory enactment, that any less complex and less guilty state of mind than the usual *mens rea* is ever made sufficient for the mental element in criminal guilt. Such statutory offences deserve consideration, not only because of their singular character, but also because they are steadily increasing both in number and in importance. Yet they are still rare; for the legislature is usually averse to creating them except where, (1) the penalty incurred is not great (usually not more than a petty fine, imposed by a petty tribunal), but (2) the damage caused to the public by the offence is, in comparison with the penalty, very great, and where, at the same time, (3) the offence is such that there would usually be peculiar difficulty in obtaining adequate

[1] For they require only what the *actus reus* itself suggests.

[2] See the cases cited in the note to *Reg.* v. *Dossett*, 2 C. and K. 506.

evidence of the ordinary *mens rea*, if that degree of guilt were to be required.

Thus where on ordinary principles there would be no guilt unless the offender actually knew all the circumstances under which he acted (or, at any rate, had wilfully and deliberately abstained from coming to know them), exceptional statutes sometimes make him guilty if, before acting, he merely failed to take effective care to *obtain* knowledge of the circumstances. The following are instances of this exceptional kind of criminal liability:—

(*a*) Trespassing in pursuit of game; though without knowing that you were trespassing[1].

(*b*) Keeping two or more lunatics without a license; though without knowing the persons to be lunatics[2].

(*c*) Possessing, for sale, unsound meat; though without knowing it to be unsound[3].

(*d*) Selling an adulterated article of food; though without knowing it to be adulterated[4].

(*e*) Selling intoxicating liquor to a drunken person; though without noticing that he was drunk[5].

In these cases, from the difficulty of obtaining legal evidence of the offender's knowledge of one portion of his *actus reus* (*e.g.*, the adulteration, or the drunkenness), something much less than actual knowledge is allowed to suffice in respect of that portion. But for all the rest of the *actus reus* (*e.g.*, the selling, or the supplying, or the walking in pursuit of game), an ordinary *mens rea* is still necessary.

[1] *Morden* v. *Porter*, 7 C. B. N. S. 641. Here, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right; *per* Wright, J., in *Sherras* v. *De Rutzen*, L. R. [1895] 1 Q. B. 922.

[2] *Reg.* v. *Bishop*, L. R. 5 Q. B. D. 259.

[3] *Blaker* v. *Tillstone*, L. R. [1894] 1 Q. B. 345.

[4] *Betts* v. *Armstead*, L. R. 20 Q. B. D. 771; *Goulder* v. *Rook*, L. R. [1901] 2 K. B. 290. *Laird* v. *Dobell*, L. R. [1906] 1 K. B. 131, is very strong. Contrast *Derbyshire* v. *Houliston*, L. R. [1897] 1 Q. B. 772.

[5] *Cundy* v. *Lecocq*, L. R. 13 Q. B. D. 207.

That is to say, the offender must have actually known that he went through the act of selling; though it will suffice that he merely neglected the means of coming to know that the butter sold was adulterated, or the purchaser of the gin was intoxicated.

Indeed, even a still slighter degree of *mens rea* than this is sometimes allowed to suffice. For even when an offence is of such a kind as not to be punishable unless committed with full knowledge of its circumstances, it occasionally happens that an offender is by statute made liable to be punished for it; in spite of the fact that it was not he, but only some servant of his, that actually knew the circumstances. To punish such a man is a startling departure from the general rule of law. For the utmost moral blame that can be imputed to him is the comparatively trivial omission of not having originally secured a trustworthy servant and of not having subsequently kept him under constant supervision. Hence, in the case of all ordinary offences, the law does not regard a master as having any such connexion with acts done by his servant as will involve him in any *criminal* liability for them (whatever may be his liability in a *civil* action of tort or contract); unless he had himself actually authorised them. And to render him liable criminally this authorisation must have been given either expressly or else by a general authority couched in terms so wide as to imply permission to execute it in even a criminal manner[1].

Thus, if a bargeman steers his barge so carelessly that he sinks a skiff and drowns the oarsman, this negligence of his will involve his master, the owner of the barge, in a civil liability, but not in any criminal one.

So fundamental is this rule that the common law seems never to have deviated from it, except in one instance, and

[1] *Rex* v. *Huggins*, 2 Ld. Raymond 1574 (K. S. C. 35); *Hardcastle* v. *Bielby*, L. R. [1892] 1 Q. B. 709; *Newman* v. *Jones*, L. R. 17 Q. B. D. 132.

this only an anomalous offence, where the prosecution is criminal merely in point of form, and in substance and effect is only a civil proceeding, its object usually being not Punishment but simply the cessation of the offence. The offence in question is that of a public nuisance (*i.e.*, one from which no particular individual incurs any special damage). In the case of any *private* nuisance, as the remedy is by a civil action, the master is liable, under the ordinary civil rule, for all the acts of his servant done in the course of his employment; even though they may have been done without the master's knowledge and contrary to his general orders. For public nuisances on the other hand, no civil action can be brought, but only an indictment. There would therefore often be much greater difficulty in obtaining effectual redress for them than for the more trivial class of nuisances, were not the master's liability for his servant's conduct made as general as in the case of mere private nuisance. It accordingly is made so[1]. This special rule has the further justification that the master, by the very fact of setting a servant upon work that may result in a nuisance, has brought about a state of things which he ought at his peril to prevent from actually producing that criminal result. Hence, instead of, as in ordinary offences, being liable only if he had authorised the servant's crime, he will, in the case of Nuisance, be liable even although he had actually forbidden it. For here, he ought, at his peril, to have seen that his prohibition was obeyed.

But whilst the common law recognises only one instance of this extreme liability, several in recent times have been created by Parliament. Thus, for example, under the Licensing Act, 1872, a publican is held to be liable for the conduct of his servants if they supply refreshments to a constable on duty[2]; or again, if they permit any unlawful game, or any

[1] *Reg.* v. *Stephens*, L. R. 1 Q. B. 702.

[2] 35 and 36 Vict. c. 94, s. 16. *Mullins* v. *Collins*, L. R. 9 Q. B. 292.

"gaming" to be carried on upon the licensed premises[1]. For, as Grove, J., says, "If this were not the rule, a publican would never be convicted. He would take care always to be out of the way." (In the offence of permitting gaming it was especially desirable to relieve the Crown of the burden of securing proof of the publican's *mens rea*. For though an *actus reus*, as we have seen[2], is usually itself sufficient *primâ facie* proof of the ordinary *mens rea*; this is not so when that *actus reus* consists merely in the offender's "permitting" some other person to do something.) Again, going still further, a man has even been held responsible for adulteration effected by a mere stranger, whose acts he had no means of protecting himself against[3].

But it must be remembered that even in these exceptional offences, where one man's *mens rea* makes another become liable, a *mens rea* is still necessary. Had the servant had no grounds for thinking that the constable was on duty, or that gaming was taking place, neither he nor his master would be punishable[4].

It is, as we have said, only in rare instances, that any less degree of *mens rea* than the ordinary one is allowed by law to suffice; and clear words are usually needed to establish that sufficiency[5]. In construing any statutory definition of a criminal offence there is always a presumption against the sufficiency of any degree of *mens rea* that falls short of the ordinary one. The lesser the suggested degree of it, or the severer the punishment, or the older the statute, the greater will be the need of clear and unmistakable words to rebut this presumption and establish the sufficiency. Hence

[1] *Ibid.* s. 17. *Redgate* v. *Haynes*, L. R. 1 Q. B. D. 89; *Bond* v. *Evans*, L. R. 21 Q. B. D. 249. "Gaming" consists in the playing for money or money's worth at any game, even though a lawful one. [2] *Supra*, p. 41.

[3] *Parker* v. *Alder*, L. R. [1899] 1 Q. B. 26. Cf. *Brooks* v. *Mason* (L. R. 1902, 2 K. B. 743), with *Emary* v. *Nolloth* (L. R. 1903, 2 K. B. 264).

[4] *Sherras* v. *De Rutzen*, L. R. [1895] 1 Q. B. 918 (K. S. C. 32).

[5] *Chisholm* v. *Doulton*, L. R. 22 Q. B. D., *per* Cave, J., at p. 741.

though the statute against Bigamy simply specifies the *actus reus*—"being married, marries"—and is silent as to requiring any *mens rea*, yet the great majority of the judges decided in *Reg.* v. *Tolson*[1] that the absence of the ordinary *mens rea* will afford a good defence for remarrying; as, for instance, where the prisoner contracted the second marriage with an honest and reasonable belief that his first wife was dead. Similarly, in *Reg.* v. *Sleep*[2], under a statute which made it an offence simply "to be found in possession of Government stores marked with the broad arrow," and said nothing as to any necessity for guilty knowledge, it was held that the prisoner could not be convicted if the jury found that, though he had possession of such stores, and had reasonable means of knowing of the mark, he neither knew of it nor had wilfully abstained from knowing of it. But in statutes that are very recent the courts are a little less reluctant to dispense with the necessity for the ordinary degree of *mens rea*. For, owing to the greater precision of modern statutes, it is permissible to draw a more emphatic inference from their silence than would be drawn in the case of an older enactment. Hence if the public evil of an offence created by some recent statute be very great, when compared with the smallness of its punishment, then even a mere silence as to guilty knowledge may be sufficient to show that the legislature did not intend ordinary guilty knowledge to be essential to the offence[3].

[1] L. R. 23 Q. B. D. 168 (K. S. C. 15). *Infra*, p. 305.
[2] L. and C. 44.
[3] *Per* Stephen, J. in *Reg.* v. *Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15).

CHAPTER IV.

EXEMPTIONS FROM RESPONSIBILITY.

We have seen that *mens rea*, in some shape or other, is a necessary element in every criminal offence. If this element be absent, the commission of an *actus reus* produces no criminal responsibility.

Blackstone's classification of the various conditions which in point of law negative the presence of a guilty mind[1], has become so familiar that it is convenient to adhere to it, in spite of the defects of its psychology. Three of his groups of cases of exemption deserve minute consideration. These are:—

I. Where there is no will.

II. Where the will is not directed to the deed.

III. Where the will is overborne by compulsion.

I. *Where there is no will.* (Students of Austin's *Jurisprudence* should be warned that Blackstone's "Will" is not Austin's "Will," *i.e.*, a volition, and indeed is not clearly definable at all; but it corresponds roughly with Austin's "Intention[2].") This absence of will may be due to any one of various causes.

(1) *Infancy.*

The most common cause, one which must place every member of the community beyond the control of the criminal law for some part of his life, is Infancy. By the law of Crime, infants are divided into three classes:—

[1] 4 Bl. Comm. 21.

[2] Austin, Lect. xix.; Clark's *Analysis of Criminal Liability*, p. 74.

i. Those under seven years of age. There is a conclusive presumption that children so young cannot have *mens rea* at all[1]. Nothing, therefore, that they do can make them liable to be punished by a criminal court; though it is not illegal for parents to administer a domestic chastisement to such children if they have, in fact, become old enough to understand it[2].

ii. Between seven and fourteen. Even at this age "infants" are still presumed to be incapable of *mens rea*; but the presumption is no longer conclusive, it may be rebutted by evidence[3]. Yet the mere commission of a criminal act is not necessarily, as it would be in the case of an adult, sufficient *primâ facie* proof of a guilty mind. The presumption of innocence is so strong in the case of a child under fourteen that some clearer proof of the mental condition is necessary[4]. The necessity for special proof of *mens rea* in the case of an infant of this age is impressed upon the jury who try him, by their being asked not only the ordinary question, "Did he do it?" but also the additional one, "Had he a guilty knowledge that he was doing wrong?"

This guilty knowledge may be shewn by the fact of the offender's having been previously convicted of some earlier crime; or even by the circumstances of the present offence itself, for they may be so marked as to afford distinct proof of a wicked mind. Thus a boy of ten who had killed a companion and buried the body in a dungheap was convicted of murder[5]. And a boy of eight was hanged in 1629 for burning two barns; "it appearing that he had malice, revenge, craft and cunning[6]." Two boys, aged eight and nine respectively, were tried at Liverpool, in 1891, for murder, in having drowned

[1] Y. B. 30 and 31 Ed. I. 511. [2] *Reg.* v. *Griffin*, 11 Cox 402.

[3] *Rex* v. *Alice* (1338), Lib. Ass. Ann. 12, f. 37, pl. 30 (K. S. C. 41).

[4] Y. B. 3 Hen. VII. f. 1, Hil. pl. 4 (K. S. C. 41).

[5] Foster 70.

[6] 1 Hale P. C. 25. The boy had attempted to fix the crime upon some one else.

another boy, in order to steal his clothes; but they were acquitted on the ground of their infancy[1].

iii. Between fourteen and twenty-one. At fourteen an infant comes under full criminal responsibility. A trifling exception, of no practical importance, is said by old writers to exist in the case of some offences of omission, which are criminal merely technically and involve no moral guilt; (*e.g.*, non-repair of a highway). In such cases the effect of infancy in producing an exemption from criminal responsibility for the omission is, however, ascribed by Blackstone not so much to any immaturity in the infant's mind, as to his not having the command of his fortune till he is twenty-one[2], and therefore probably not having the pecuniary means necessary for discharging the duty which he has omitted.

(2) *Insanity*[3].

Absence of "Will" may also arise, not from the natural and inevitable immaturity which we have just discussed, but from a morbid condition of mind.

Within a century of our own time so eminent a statesman as Windham could urge in Parliament the view that even the most insane criminal ought to be hanged for his crime "for example's sake." But the English law, even in its harshest days, never adopted any rule so much at variance as this would be with every intelligible theory of criminal punishment, whether regarding it as deterrent or even as retributive. On the other hand our law has never held (as a widespread popular error imagines it to hold) that the mere existence of insanity is of itself necessarily sufficient to exempt the insane person from criminal responsibility. Only insanity of a particular and appropriate kind will produce any exemptive effect. For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of

[1] The *Times*, Dec. 12, 1891. [2] 4 Bl. Comm. 22.

[3] See Sir J. Stephen, *Hist. Cr. Law*, II. 124—186; *General View of Criminal Law*, 1st ed., 86—96.

punishment; they usually plan their crimes with care, and take means to avoid detection. Lord Brougham tells a striking story of the patients confined in the York Asylum having discussed amongst themselves the case of the incendiary, Martin, when he was about to be tried for setting York Cathedral on fire. The conclusion which they reached was—"He will be all right; for he is one of us, so the law will take no notice of him." They were quite capable of taking into account the chances of being or not being punished[1].

Not only popular opinion but even the opinion of medical experts inclined at one time to the view that the presence of any form whatever of insanity in the man who has committed a criminal act is—or at any rate ought to be—legally sufficient to afford him immunity from punishment. But of late years the accumulated results of a careful observation of insane patients in various countries has thrown clearer light upon the mental processes of the insane; and has brought back medical opinion into closer accord with the views of lawyers. The world, it is now recognised, is full of men and women in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears which control the conduct of ordinary people. To place such persons beyond the reach of the fears which criminal law inspires, would not only violate the logical consistency of our theory of crime, but would also be an actual cause of danger to the lives and property of all their neighbours. Where insanity takes any such form, it comes clearly within the rule of criminal legislation propounded by Bain[2]:—"If it is expedient to place restrictions upon the conduct of sentient beings, and if the threatening of pain

[1] "Lunatic prisoners, when guilty of assaulting a prison warder, will sometimes say 'You can't touch me; I am a lunatic.'" (Dr John Campbell's *Thirty Years' Experiences of a Medical Officer*, p. 92.)

[2] *Mental and Moral Science*, p. 404.

operates to arrest such conduct, the case for punishment is made out."

English law therefore divides, and would seem to be fully justified in dividing, insane persons into two classes:—

(*a*) Those lunatics over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishments; and

(*b*) Those whose form of insanity is only such that—to use Lord Bramwell's apt test—"they would not have yielded to their insanity if a policeman had been at their elbow."

But the very difficult practical question as to where the line of demarcation should be drawn between the two classes, is one upon which the views of English judges have undergone grave though gradual changes, and even now cannot be said to have developed into a complete or even a perfectly stable form. At one time a view prevailed[1] that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield[2] a view at once more rational and humane has prevailed, which bases the test upon the presence or absence of the faculty of distinguishing right from wrong.

In a still later generation, this modern rule as to the criminal aspects of insanity acquired a degree of authoritative precision, unusual for any common law doctrine, through its formulation, in 1843, in an abstract shape by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords. One Daniel McNaughten had aroused great public excitement by the murder of a Mr Drummond, the private secretary of Sir Robert Peel, in mistake for the statesman himself. The acquittal of

[1] *Rex* v. *Arnold* (1724), 16 St. Tr. 704, *per* Tracey, J.

[2] *Rex* v. *Hadfield* (1800), 27 St. Tr. 1281.

McNaughten on the ground of insanity provoked such widespread dissatisfaction, and so much public attention, that it became the subject of debate in the House of Lords (though the case never came before that House in its judicial capacity). In consequence of the debate, the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions[1]. The replies given by the judges, to these questions, may be summed up thus:—

(i) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of a jury.

(ii) To establish a defence on the ground of insanity, it must be clearly shewn that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or (if he did know this) not to know that what he was doing was wrong.

(iii) As to his knowledge of the wrongfulness of the act, the judges say:—"If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(iv) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts with respect to which the delusion exists had been as he imagined them to be.

Let us add that, for a defence of insane delusion, the act must be directly connected with the delusion. (An instance of such connexion, though due not to insanity but to sleep,

[1] *Reg.* v. *McNaughten*, 10 Cl. and F. 200, 4 St. Tr. (N.S.) 847; Townsend's *Modern State Trials*, I. 326; K. S. C. 43.

may be cited from Germany where a man, dreaming that he was struggling with a wolf, strangled his wife.) So a man has been convicted of obtaining money by false pretences notwithstanding his being so insane as to be under the delusion that he was the lawful son of a well-known prince. But, as Sir J. Stephen points out[1], "juries ought to be careful not to conclude hastily that there is no connexion between a madman's conduct and his delusion because a sane man would see no connexion between what he does and what, under the influence of his delusion, he believes."

The questions put to the judges had reference, as we have seen, only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also, and indeed more frequently, their emotions and their wills. Hence, during the period which has elapsed since 1843, much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down in the judges' answers, given after McNaughten's trial, remain theoretically unaltered, the practical administration of them has been such as to afford a wider immunity than their language would at first sight seem to recognise[2]. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to shew that one or other of those exemptive defects was also actually present. A man who after killing his child, goes forthwith to the police station to surrender himself, and

[1] *Hist. Cr. Law*, II. 163.

[2] "Had the McNaughten dictum been rigidly insisted on, it would have been the means of hanging more than half the women who are now in Broadmoor, as criminal lunatics, for the murder of their children;" (Dr David Nicholson, late Superintendent of Broadmoor, as quoted by Dr Clifford Allbutt in his *System of Medicine*, VIII. 456).

gives a lucid account of what he has done, would certainly seem to know the nature and quality of the act committed, and to know that in doing it he did wrong. Yet if he had previously shewn some symptoms of madness, and has killed this child with no discoverable motive and with no attempt at concealment, a judge would probably encourage a jury to regard these facts as evidence of his labouring under such a species of insanity as would justify them in pronouncing his acquittal[1]. The mere fact that a crime has been committed without any apparent motive is, of course, not sufficient of itself to establish any similar immunity[2].

How far an insane impulse to do an act is to be regarded as affecting the criminal responsibility for doing it, is a question which is not yet definitely settled. In the United States both the Supreme Court[3] and the courts of almost all the States recognise irresistible impulse as being a sufficient defence, even when accompanied by a knowledge that the act was wrong. In England, however, the balance of authority is the other way. In several cases (coming down to so recently as the year 1882) it has been held that an insane impulse, even when uncontrollable, affords no defence[4]. On the other hand, the authority of Sir James Stephen[5] and the dicta of other judges[6] support the view that an insane impulse should be admitted as a defence

[1] Cf. *Reg.* v. *Jackson* (1895), *Central Criminal Court Sessions Papers*, CXXII. 1156; and the still stronger case tried before Bigham, J. (*Times*, July 29, 1901), of Hannah Cox, a devoted mother, who, under pressure of poverty, drowned two of her infants, "as it was the best thing she could do for them." Though she had shewn no other symptoms of insanity, either before or after this act, the judge advised the jury to acquit her.

[2] *Reg.* v. *Haynes*, 1 F. and F. 666 (K. S. C. 52).

[3] *Life* v. *Terry*, 15 Wall, 580.

[4] *Reg.* v. *Burton*, 3 F. and F. 772 (K. S. C. 50); *Reg.* v. *Haynes*, 1 F and F. 666 (K. S. C. 52).

[5] *Dig. Cr. Law*, Art. 28; *Hist. Cr. Law*, II. 167.

[6] *E.g.*, Denman, C. J., in *Reg.* v. *Oxford*, 9 C. and P. 525.

if really irresistible, (not merely unresisted)[1], because then the act done would not be a "voluntary" act at all. Stephen, indeed, regards this view as being a consequence, rather than a contradiction, of the doctrines laid down by the judges of 1843 in their answers. He adds to it a single qualification—"unless this absence of the power of control has been produced by his own default."

There is one form of insane impulse, that of kleptomania, which is sometimes put forward, with or without evidence, by well-to-do persons accused of trivial acts of theft. It naturally is chiefly in courts of Petty Sessions that these unimportant charges are preferred; and in such courts a plea of insanity is the safer to raise because they do not possess the power, enjoyed by higher tribunals, of ordering an accused person, who establishes this plea, "to be kept in custody as a criminal lunatic[2]." Hence as to the legal effect of kleptomania it is impossible to speak with certainty, as there seems to be no reported case in which any judge of assize has dealt with this subject.

That the impulse to steal does sometimes arise from actual insanity seems to be established[3] by the fact that it is often limited to special times (*e.g.*, that of pregnancy) or to some special class of objects, which are accumulated in numbers not at all needed by the thief (*e.g.*, hats, boots, table-cloths).

Whilst the law as to insane impulses is thus still in dispute, the more novel subject of hypnotism has not yet become a subject of judicial consideration in this country at all. Continental tribunals are already familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion," exercised by some designing person

[1] A remarkable instance of continued and successful resistance to an insane impulse is referred to by Stephen, *Hist. Cr. Law*, II. 172.

[2] Trial of Lunatics Act 1883 (46 and 47 Vict. c. 38, s. 2).

[3] See Taylor's *Med. Jur.* 10th ed. 757.

who had induced hypnotic sleep in the offender. It remains to be seen what exemptive effect will ever be accorded in England to such "suggestions," or to those affections which (like hysteromania and neurasthenia) have been called the borderland of insanity. Such questions have become of great practical importance, now that modern science has come to recognise so clearly, in addition to that familiar form of insanity which impairs a man's Judgment, other and subtler forms which affect his Will, whether by weakening his natural impulses to action or by inspiring abnormal impulses. These may be called "Affective" insanity, as opposed to the better-known "Intellectual" insanity[1].

In the United States, insanity, even when it is not of such a character as to confer complete exemption from responsibility, is recognised as a circumstance that may mitigate the offender's punishment. Prof. Clifford Allbutt[2] defends this view; on the ground that every form of insanity weakens the power of self-control, and that thus the offender's moral guilt is proportionately lessened, and therefore his punishment ought to be the less. And even in England a weakened capacity of self-control is in practice often thus treated—whether with strict legality or not—as a mitigating circumstance; as where a sunstroke has left a man with a will-power permanently so weakened that he pursues any passing pleasure with little regard for consequences. Yet the argument urged by Prof. Allbutt might be at least as aptly employed for the opposite purpose of shewing that insanity, when not of such a form as to destroy responsibility, should actually aggravate the punishment; for the weaker a man's will, the more sternly does it need to be braced by the fear of penalty.

In cases where a defence of insanity has been accepted by a jury, the form of their verdict used to be "not guilty"

[1] Cf. Ribot, *Les Maladies de la Volonté*; Poore's *Medical Jurisprudence*, p. 822.

[2] *System of Medicine*, VIII. 291.

on the ground of insanity. But now, under the Trial of Lunatics Act 1883 (46 and 47 Vict. c. 38), it is to be "guilty of the act (or omission), but so insane as not to be responsible, according to law, for his actions at the time when the act was done (or the omission made)."

The Court then orders the prisoner to be kept in custody as a "criminal lunatic[1]," till His Majesty's pleasure shall be known; and His Majesty may order him to be kept in custody, during his pleasure, in such place and manner as he may think fit. The confinement is usually lifelong[2]; and consequently the defence of insanity is rarely set up in the higher criminal courts except in capital crimes[3].

It may be added that insanity is sometimes important in criminal law, even apart from its bearing on *mens rea*. For if a man become insane after committing a crime, he cannot be tried until his recovery; and, again, if after conviction a prisoner become insane, he cannot be hanged until his recovery, for he may have some plea which, if sane, he could urge in stay of execution[4].

(3) *Intoxication*.

Drunkenness is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time

[1] On the other hand, a "lunatic criminal" is a convicted criminal who, whilst undergoing his imprisonment, has become insane.

[2] If we leave out of view those female prisoners whose insanity was merely a puerperal mania, only about one prisoner in 150 obtains release from Broadmoor.

[3] An unusually minute picture of the practical working of a trial where this defence is raised may be seen in the *Times* of April 20th, 1882, which reports the trial of Maclean before a special commission (Coleridge, L.C.J., and Huddleston, B.), for High Treason in shooting at the Queen. The criminal act was admitted, and the only issue was that of sanity. Coleridge, L.C.J., in his summing-up, fully accepted the McNaughten answers as the true legal test of responsibility.

[4] 1 Hale P. C. 34. Of the 10,797 persons indicted during the statistical year 1901, 24 were found to be so insane as to be incapable of trial, whilst 40 of those tried were acquitted on the ground of insanity.

as great an aberration of mind as would, if caused by insanity, constitute a legal exemption from responsibility. For, closely akin though it is to a temporary insanity, it differs from it by having been produced voluntarily. And to produce it, is morally wrong; and was until 1872 even a criminal offence[1]. It is thus a madness for which the madman is to blame[2]. Accordingly the law will not permit him to excuse one wrongful act by another[3]. His *mens rea* in allowing himself to become intoxicated is sufficient to supply the ordinary mental element of guilt to any criminal act which may ensue from it. Thus if someone be shot in consequence of a drunken man's careless handling of a pistol, the fact that his negligence was due to intoxication does not make it any more innocent than the similar negligence of a sober man. If, however, a man's habits of drinking have resulted in rendering him truly insane, insanity, even though caused thus, will have just the same effect in exempting him from criminal responsibility as if his madness had not been so brought on by his own voluntary misconduct[4]. Thus it has been held by Stephen, J.[5], that where *delirium tremens* caused by drink produces, although only temporarily, such a degree of madness as to render a person incapable of distinguishing right from wrong, he will not be criminally responsible for acts done by him while under its influence.

Occasionally, however, instances arise of a drunkenness to which no moral blame attaches; for example, where it has been produced by the contrivance of malicious companions[6], or by the administration of alcohol for adequate medical reasons (as in the rough treatment of snake-bites habitually adopted by the backwoodsmen of the Western States of

[1] 4 Jac. I. c. 5, s. 2; repealed by the Licensing Act 1872.

[2] It still remains so unlawful that a contract for it would be void.

[3] A convivial Scotch judge is recorded by Lord Cockburn to have gone further, and considered drunkenness to aggravate the offence, "If a man is like this when he is drunk, what must he be when sober?"

[4] 1 Hale P. C. 32. [5] *Reg.* v. *Davies*, 14 Cox 563. [6] 1 Hale P. C. 32.

America). In these rare cases, an *actus reus* committed by the intoxicated man may involve him in no punishment; since it has been preceded by no *mens rea*, neither the usual immediate one, nor even the remote one of voluntarily getting drunk.

Moreover, even the ordinary blameable drunkenness may sometimes have the effect of diminishing criminal responsibility; for it may disprove the ordinary inferences which otherwise would be drawn from conduct. Thus:—

(*a*) It may easily produce such a mistake of fact as will in itself (as we shall hereafter see[1]) excuse an otherwise unlawful act. Thus a man's drunken confusion may lead him to imagine that others are threatening to assault him, and he may strike them in supposed self-defence[2].

Indeed, Mr Justice Day is said to have held, by a general application to drunkenness of the principles laid down as to insanity in the McNaughten answers, that "If a man is in such a state of intoxication as either not to know the nature of his act, or not to know its wrongfulness, his act will be excusable[3]."

(*b*) Though it usually leaves the prisoner as guilty as if he had had the ordinary *mens rea* of a sober man, yet it may disprove the presence of some additional *mens rea* that is essential to the definition of some particular crime. It may, for instance, disprove the presence of murderous malice, or of an intent to do grievous bodily harm[4], or of an intent to commit a felony. It may thus shew that a man who has broken into a house[5] has had no felonious intent, and so has not committed burglary. Similarly, where a woman who had jumped into a well was shewn to have been "so drunk as not to know what she was about," this was held to be good evidence that she had no felonious intention to destroy

[1] *Infra*, p. 65. [2] *Reg.* v. *Gamlen*, 1 F. and F. 90 (K. S. C. 54).

[3] *Reg.* v. *Baines*, cited by Archbold from Wood-Renton's *Lunacy*, p. 912.

[4] *Rex* v. *Meakin*, 7 C. and P. 297 (K. S. C. 54).

[5] *The State* v. *Bell*, 29 Stiles, 316 (K. S. C. 55).

herself[1]. But it must depend upon all the circumstances of each particular case whether or not drunkenness is to have this effect. Thus, though the fact of a man's being drunk will tend to shew that in using a stick intemperately he was not actuated by malice, it will not suffice to disprove his having an "intent to do grievous bodily harm" when he uses some dangerously harmful weapon[2].

Digressing, for a moment, from the question of the effect of drunkenness upon the liability of those who are under its influence at the time of committing an offence, it may be convenient to add here that the fact of an accused person's having been drunk at some time subsequent to that when the offence was committed, may occasionally help towards his acquittal, by rebutting some supposed evidence of his having done the deed which he stands accused of. For it may explain away acts subsequent to the crime, which are such as would raise suspicions of guilt if they had been done by a sober man; as where, on being upbraided or arrested, he has made confused or contradictory statements, or has refused to make any statements at all.

(4) *Corporations.*

Corporations, as such, formerly lay quite outside the sweep of criminal law. Hence if a crime had been committed by the orders of a corporation, criminal proceedings, for having thus instigated the offence, could only be taken against the separate members in their individual personal capacities, and not against the corporation as itself a guilty person[3]. This view was a natural enough inference from the technical rule that criminal courts expect a prisoner to answer at their bar himself, and do not permit "appearance by attorney[4]." But

[1] *Reg.* v. *Moore*, 3 C. and K. 319. [2] *Rex* v. *Meakin*, *supra*.

[3] *Per* Holt, C.J., 12 Mod. 559. Cf. Pollock and Maitland, I. 473, 661.

[4] This technical difficulty was evaded by the device of removing any indictment of a corporation into the Queen's Bench; as that Court would allow it to appear by attorney.

it was further supported also by more scientific considerations, which the Roman law had anticipated and accepted[1]. It was urged that a corporation, as it had no actual existence, could have no will; and therefore could have no guilty will[2]. And it was further urged that, even if the legal fiction which gives to a corporation an imaginary existence may be stretched so far as to give it also an imaginary will, yet the only activities that can consistently be ascribed to the fictitious will thus created, must be such as are connected with the purposes which it was created to accomplish. Hence, it cannot compass a crime; for any crime would be necessarily *ultra vires*.

But under the commercial development which the last two generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy this immunity. The various theoretical difficulties have therefore been brushed aside; and it is now settled law that corporations may be indicted by the corporate name, and that fines may be consequently inflicted upon the corporate property. The innovation was introduced at first by drawing a distinction between offences of non-feasance and those of mis-feasance; on the ground that whilst, in the case of a criminal misfeasance, the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of a non-feasance, for the omission would not be imputable to any individual agent but solely to the corporation itself. Hence, in 1840, an indictment for non-feasance, in omitting to repair a highway,

[1] But the theory of Germanic law inclined the other way; as our English institution of Frankpledge (Stubbs' *Const. Hist.* I. 618) may serve to remind us. Cf. Maitland's *Political Theories*, p. xxxix.

[2] Hence, even in civil actions, doubts were entertained, until a very few years ago, as to the possibility of holding a corporation liable for those species of Tort in which "express malice" is a necessary element. *Abrath* v. *North Eastern Ry. Co.*, L.R. 11 A. C. 247.

was allowed against a corporation, in *Reg.* v. *Birmingham and Gloucester Ry. Co.*[1] Soon afterwards, in the case of *Reg.* v. *The Great North of England Ry. Co.*[2], an indictment was similarly allowed even for a mis-feasance, that of actually obstructing a highway. And the principle has received legislative approval. For the Interpretation Act 1889[3] provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression 'person' shall, *unless a contrary intention appears,* include a body corporate. The gravity, or the nature, of an offence may, as we shall shortly see, be sufficient to shew that the framers of enactments about it could not have had any intention of regarding bodies corporate as capable of committing it.

For, although there is no longer any difficulty in indicting a corporation, there may be a difficulty in punishing it. True, it possesses property, and it can be therefore fined. But it possesses no body, and therefore it cannot be hanged or imprisoned. Hence arises a limit to the range of its criminal liability; viz. that a corporation can only be prosecuted, as such, for those offences which the law allows to be punished by a fine. Thus, whilst it can be indicted and fined for a libel published by its order[4], it cannot be indicted for a treason, or a burglary, or any of the other offences which are too grave to admit of being visited adequately by a merely pecuniary penalty. If any crime so heinous be committed by the orders of a corporation, the various persons by whom it was ordered must be indicted individually in their own names, and punished in their own persons. It must be remembered that they are also liable to be thus individually indicted, even in the case of those

[1] 3 A. and E. (N. S.) 223. See *Reg.* v. *Tyler*, L. R. [1891] 2 Q. B. 588.
[2] 9 A. and E. (N. S.) 315 (K. S. C. 69).
[3] 52 and 53 Vict. c. 63, s. 2. *Pearks* v. *Ward*, L. R. [1902] 2 K. B. 1.
[4] See *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314.

less heinous offences for which their corporation might itself be indicted; for it becomes indictable only through the fact that a wrong has been instigated by them.

II. *Where the will is not directed to the deed.*

We may fairly regard this state of mind as always arising from mistake or some other form of ignorance; (*e.g.*, taking from the hat-stand in your club another man's umbrella in mistake for your own). Blackstone[1] speaks of there being also a class of cases in which it arises from (what he calls) Misfortune; apparently with the idea of distinguishing, from acts done with the expectation that no *unlawful* result would follow on them, some acts done with the expectation of their being followed by no result at all. But it does not seem possible to draw accurately any such line of demarcation. And inasmuch as, even were it drawn, the legal treatment of the two classes would present no points of difference, all distinction between them may well be disregarded here.

Our criminal law often allows mistake or ignorance to afford a good defence by shewing, even where there has been an *actus reus*, that no sufficient *mens rea* preceded it. But such a defence can only arise when three conditions are fulfilled.

(1) The first condition is that the mistake must be of such a character that, had the supposed circumstances been real, they would have prevented any guilt[2] from attaching to the person in doing what he did. Therefore it is no defence for a burglar, who breaks into No. 5, to shew that he mistook that house for No. 6; or that he did not know that nine o'clock had already struck. Similarly, on an indictment for assaulting a constable "in the discharge of his duty," the fact that the assailants did not know of his official character will be no defence for them. On the other hand, it will be no offence to lay violent hands upon a person, whom you

[1] 4 Bl. Comm. 26.

[2] As to whether this means legal guilt or merely moral guilt, see p. 41 *supra*.

reasonably, though mistakenly, suppose to be committing a burglary[1]. The cases of *Reg.* v. *Prince* and *Reg.* v. *Tolson*, which we have already discussed[2], afford important illustrations of this principle.

(2) A further condition is that the mistake must be a reasonable one. This will be mainly a question of fact. But in extreme cases the jury may be assisted by the judge's directions as to some mistakes being clearly reasonable and some others clearly unreasonable. Of the former class an illustration is related by Sir Michael Foster[3]. A man, before going to church, fired off his gun, and left it empty. But during his absence his servant went out shooting with the gun; and, on returning, left it loaded. The master, after his mid-day meal, took up the gun again; and in doing this, touched the trigger. The gun went off, and killed his wife, who was in the room. Foster held that in these circumstances the man had reasonable grounds to believe that the weapon was not loaded. The case might well have been otherwise if weeks, instead of hours, had elapsed between his firing off the gun and his subsequently handling it without taking any pains to see whether it had meanwhile been loaded again[4]. Similarly in an American case[5], where a constable was charged with arresting a man unlawfully, it appeared that the man had fallen down in the street in a fit, and his friends had first tried to revive him by administering whiskey, and then had gone away to seek help. The constable was acquitted; for the fact that the man smelt of whiskey afforded reasonable ground for supposing his insensibility to be due to intoxication (which would, there, have been a lawful ground for taking him into custody).

[1] *Rex* v. *Levett*, Cro. Car. 538 (K. S. C. 26).

[2] *Supra*, p. 41, and p. 48.

[3] Foster 265 (K. S. C. 27).

[4] Contrast *Reg.* v. *Jones*, 12 Cox 628 (K. S. C. 28); *The State* v. *Hardie*, 10 Runnells 647 (K. S. C. 123); cases where a mistaken belief that the firearms were unloaded was unreasonable.

[5] *Commonwealth* v. *Presby*, 14 Gray 65.

On the other hand, no belief which has now come to be currently regarded as an obsolete superstition can be treated as a mistake sufficiently reasonable to excuse a crime which it may give rise to. Thus in 1880, at Clonmel, a woman who had placed a child naked on a hot shovel, in the honest belief that it was a deformed fairy sent as a substitute for the real child, (who would be restored if the changeling were thus imperilled), was convicted, and was sentenced to imprisonment. Similarly, in 1895, again at Clonmel, a party of men were tried, who had caused the death of the wife of one of them by holding her over a fire and searing her with a red hot poker, in the honest expectation of thereby exorcising a demon that was supposed to possess her. But their mistake was too "unreasonable" to afford any excuse for the homicide it occasioned. In like manner people who break the law in consequence of a belief that they are obeying a Divine command, are legally regarded as actuated by a mistake which is "unreasonable." Illustrations are afforded in America by the prosecutions of Mormons for polygamy[1]; and in England by the prosecutions of the "Peculiar People" for withholding medical aid[2] from their sick children. (At the same time it must be remembered that some religious delusions may be of so extreme a character as to be evidence of insanity, and to afford a good defence upon that ground[3].)

(3) The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of "fact." For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. *Ignorantia juris neminem excusat*[4]. The utmost effect it

[1] *Reynolds* v. *United States*, 98 U. S. 145 (K. S. C. 81).

[2] *Reg.* v. *Senior*, L. R. [1899] 1 Q. B. 283.

[3] *Rex* v. *Hadfield*, 27 St. Tr.

[4] For a discussion of the justifications that may be offered for this severe rule, see Austin's *Jurisprudence*, Lect. xxv., and Markby's *Elements of Law*, secs. 269, 270. Perhaps after considering them all, the student may still

can ever have is that it may occasionally, like drunkenness[1], rebut the existence of the peculiar form of *mens rea* which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a *bonâ fide* mistake of law, if based upon reasonable grounds,—like that of a woman who gleans corn in a village where it is the practice to do so—will afford a sufficient defence[2]. Similarly a mortgagor who, under an invalid but *bonâ fide* claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of "malicious" damage[3]. Apart, however, from these exceptional offences, the rule which ignores mistakes of law is applied with rigour. A sailor has been convicted of an offence that had been forbidden only by an Act of Parliament of which he could not possibly know, since it was enacted when he was far away at sea, and the offence was committed before the news of its enactment could reach him[4]. Frenchmen, who had acted as seconds in a fatal duel here, have similarly been committed for trial on a charge of murder, although their own law permitted duelling and they did not know that English law forbade it[5]. Various Italians have recently been punished in London for keeping lotteries, in spite of their urging that in Italy every little village possesses a lottery sanctioned by the State, and that they had no idea that the English law could be different. It is therefore easy to see that a veterinary surgeon's mistaken belief that an operation, which he knows

feel compelled, with the late Prof. Henry Sidgwick, to regard the rule as "not a realisation of ideal justice, but an exercise of Society's right of self-preservation." For the milder principles adopted in Roman Law see Justinian's *Digest*, XXII. 6, and Lindley's *Jurisprudence*, p. 24 and App. xix.

[1] *Supra*, p. 61.

[2] *Infra*, Bk. II. ch. 8.

[3] *Reg.* v. *Croft*, [1889] C. C. C. Sess. Pap. CXI. 202.

[4] *Rex* v. *Bailey*, R. and R. 1 (K. S. C. 29).

[5] *Barronet's Case*, 1 E. and B. 1.

to be painful and purposeless[1], is nevertheless unpunishable legally, will afford him no defence for performing it. Again, where a Parliamentary elector, who had a qualification in each of three polling-districts of the same county constituency and accordingly was on the register of each, voted at all the three respective polling-stations, but in the honest and not unnatural belief that he could legally do so, he was held by Stephen, J., to have no legal defence for this criminal conduct[2].

These mistakes are reasonable enough; yet they afford no excuse. Nor would they do so, even if the prisoner could shew that he had taken pains to obtain a lawyer's advice and had been misled by it. Still less, therefore, can any excuse be conferred by legal errors that are unreasonable. Some such occasionally occur in connexion with the law of Marriage. In a trial for bigamy, which I witnessed at the Central Criminal Court in 1883, it appeared that not only the prisoner himself, but also his first wife and all her family, had believed his marriage with her to be void, because the wedding-ring was only of brass and not of gold. In a much more recent case, where the first marriage was between a Catholic and a Protestant, the parties had believed it to be invalid because they had gone through a Roman Catholic marriage alone, and had not superadded a Protestant ceremony.

But although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may of course afford good grounds for inflicting on him a milder punishment[3].

[1] In England dishorning cattle is decided to be thus illegal, *Ford* v. *Willy*, L. R. 23 Q. B. D. 203; though held legal in Scotland and Ireland, 23 Ir. L. R. Q. B. 204. It is an embarrassing but unsettled question whether the Jewish mode of slaughtering cattle is illegal in England.

[2] *Reg*. v. *Hearn*, C. C. C. Sess. Pap. CIII. 561.

[3] *Rex* v. *Esop*, 7 C. and P. 456.

III. *Where the will is overborne by compulsion.*

(1) *Public civil subjection*[1]. This rarely affords any defence in English law. Though the King can do no wrong, either civilly or even criminally,—or, rather, *because* the King can do no wrong—his subordinates must be held strictly accountable for any wrongs they may commit on his behalf. Hence a soldier or sailor or constable, who unlawfully does violence to any one, cannot simply plead as a defence that he was acting under orders from his superior officer, or even from the King himself[2].

Of course such orders, when not *obviously* unlawful, may be relevant to his defence under some more general rule of law. They may give him such a "claim of right[3]" as renders it no larceny for him to appropriate another man's goods; or such grounds for supposing his conduct to be lawful as will render his Mistake of Fact[4] a valid defence.

And, more than this, by a special rule as to Public Subjection, a Mistake even of Law may afford a defence to a public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus when violence is exercised by a gaoler or hangman in carrying out an invalid sentence, then, though the violence was criminal, yet if the Court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's public official subjection affords him immunity[5]. And a marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, seems[6] not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board, for such orders he might reasonably fancy to be

[1] 4 Bl. Comm. 28.

[2] *Infra*, p. 77; cf. Pollock on Torts, ch. 4, s. 1. See Hallam's *Constitutional History*, ch. I. p. 8, and ch. VII. p. 526, as to this peculiarly English check upon royal authority. [3] *Infra*, p. 203. [4] *Supra*, pp. 65--69.

[5] 9 Coke 68; 1 Hale 496; 1 Hawkins, ch. 28; 1 East P. C. 331.

[6] *Rex* v. *Thomas* (3 Russell on Crimes 94). Cf. *Reg.* v. *Smith*, 17 Cape of Good Hope 561; and Stephen's *Hist. Cr. Law*, I. 205.

lawful. Yet he would be guilty if he knew them to be given from a mere desire to keep the ship agreeably isolated.

But some cases of immunity have been referred to this ground of exemption, where in reality even the primary element of a crime—the *actus reus* itself—was absent. Thus—to take the illustration relied on by Blackstone—the sheriff who, in Mary's reign, burnt the martyrs Latimer and Ridley, was certainly exempt from liability for "executing so horrid an office"; but it was not because he did a guilty act with an innocent will overborne by public subjection, but because his act, (that of executing the sentence of a Court of Justice), was itself a lawful and indeed an obligatory one. If, indeed, he had refused to burn the martyrs, he would then have committed an indictable crime.

(2) *Private civil subjection* is of little more importance as a ground of defence than public is. It affords no exemption to servants or children who commit crimes at the instigation of a master or a parent. It is only in the case of conjugal subjection that it ever amounts to a defence. For if a wife commits any ordinary crime in her husband's actual presence and by his instructions, she is presumed *primâ facie* to have committed it under such a compulsion as to entitle her to be acquitted[1]; though there be no proof of any shew of intimidation by him. (Yet for any crime committed by her when he is not actually present, his previous orders or threats would afford her no more excuse than those of any other instigator would do.) This presumption of coercion extends, (so the majority of writers assert), to all misdemeanors, except those that are connected with the management of the house (for in that matter the wife is assumed to be the person chiefly active[2]). And it extends to most felonies[3], *e.g.*, to burglary, larceny, forgery. But it does not extend to felonies that are of extreme gravity, such as treason and

[1] Lib. Ass. Ann. 27, f. 137, pl. 40 (K. S. C. 65). [2] 1 Hawk. c. 1, s. 12.

[3] Kelyng 31 (K. S. C. 66). In 1891 Cave, J., allowed this exemption in a case of arson.

murder[1]; though the exact line of demarcation has not yet been drawn. Even, however, where the defence is admissible, this presumption of subjection is only a *primâ facie* one. It may be rebutted by proof that the wife took so active a part in the crime as to shew that her will acted independently of her husband's[2].

The singular privilege thus accorded to the wife, yet denied to the child, admits of a curious historical explanation. "Benefit of clergy"—the right of any man, who could read, to escape capital punishment—was denied to women. Hence, whenever a man and his wife were charged with jointly committing any felony, the man, if he could make a semblance of reading, would get off, whilst the woman, though probably the less guilty of the two, would be sentenced to death. This injustice was evaded by the establishment of this artificial presumption of conjugal subjection.

It may perhaps be convenient, though not strictly relevant, to mention here that, besides this general exemption on the ground of *mens rea,* there are a few cases in which even an act itself, otherwise criminal, that has been done by a wife, will cease to be *reus* because of its connexion with the relations between her and her husband. Thus, if a husband who has committed a crime is received and sheltered by his wife, she is not regarded by the law as becoming thereby an accessory after the fact[3]. Similarly, if she takes in goods which he has stolen, she does not thereby become guilty of "receiving stolen property[4]." Again, in consequence of the conjugal unity by which the married pair are—for many purposes—regarded in law as constituting only a single person, no criminal agreement to which they are the only parties can amount to the crime of conspiracy[5]; for a conspiracy needs two conspirators. And,

[1] *The Earl of Somerset's Case*, 2 St. Tr. 911.

[2] *Reg.* v. *Cruse*, 2 Moody 53 (K. S. C. 66).

[3] 1 Hale 47.

[4] *Reg.* v. *Brooks*, Dearsly 184.

[5] 1 Hawk. P. C. c. 72, s. 8.

similarly, a libel published against a husband by his wife, or one on a wife published by her husband, constitutes no offence[1].

(3) *Duress per minas* is a very rare defence; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats[2]. But is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Yet it may excuse the still graver offence of treason, though only in its minor forms: as where a prisoner shews that under pain of death, or of some physical injury falling little short of death, he was forced into giving some subordinate assistance in a rebellion. But he must shew that the compulsion continued throughout the whole time that he was assisting; and that he did no more than he was obliged to do; and that he desisted at the earliest possible opportunity[3]. Moreover, according to Sir James Stephen, this defence is admissible only where the prisoner has been threatened by a plurality of persons. Yet it would seem, on principle, that two persons may differ so much in strength, or in weapons, that a degree of compulsion sufficient to exempt may have been exercised by one of them over the other, although there was but this single threatener.

Fears of some lesser degree of violence, insufficient to excuse a crime, may nevertheless mitigate its punishment. It was remarked by Lord Denman that, wherever there are two criminals, one of them is always to some extent in terror of the other[4]. In such a case the timid rogue will

[1] *Reg.* v. *Lord Mayor of London*, L. R. 16 Q. B. D. 772.
[2] 1 Hale P. C. 49. [3] *Rex* v. *McGrowther*, Foster 13 (K. S. C. 56).
[4] *Reg.* v. *Tyler*, 8 C. and P. 616 (K. S. C. 57).

usually deserve a less severe punishment than his masterful associate.

(4) *Necessity*. The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving the community from a much greater harm, has from early times been recognised as a defence in civil actions, brought to recover compensation for the harm thus inflicted[1]. It is admittedly no tort to pull down houses to prevent a fire from spreading[2], or to enter a person's house to put out a fire. It is therefore natural that such necessity should be still more readily admissible as a defence to criminal proceedings; both because in them the object is not to compensate mere loss but only to punish actual guilt (which here seems almost or altogether absent), and also because punishment itself must fail to attain its great object, that of Deterrence, in those cases of necessity where the evil it threatens is less than the evil which would have been suffered if the crime had not warded it off. A person who violates some municipal bye-law, or commits some similar trivial offence, for the purpose of saving life—who goes at night, shall we say, on a lampless bicycle to fetch the fire-engine—would seem to have a valid legal excuse. Yet though theoretical writers have been willing to accept this ground of defence, the actual law on the subject is extremely scanty and vague. Indeed there is no English case in which the defence has actually been raised with success. Yet Lord Mansfield gave an *obiter dictum* that even an act of treason, like the deposition of a colonial governor by his Council, might, in some circumstances of public danger, be justified by its necessity[3]. It has always been thought that if provisions run short during a voyage, the captain of the

[1] For necessity as a civil defence, see Pollock on Torts, 6th ed. p. 168.

[2] Dyer 36 *b*. See Kenny's *Select Cases on Torts*, pp. 161—170.

[3] *Rex* v. *Stratton*, 21 St. Tr. 1222. The correctness of this dictum was conceded by Lord Coleridge in *Reg.* v. *Dudley*; (see next page).

ship commits no larceny by breaking into the cargo to feed his crew. In *Gregson* v. *Gilbert*[1], which was an action on a policy of marine insurance to recover the value of a hundred and fifty slaves, who had been thrown overboard during a voyage because the casks of water were running short and a hundred slaves had already died of thirst, no doubt was suggested, either by the Court or even at the bar, as to extreme necessity being capable of excusing even so awful an act as this. But there the question of criminal liability did not directly arise; and now, since *Reg.* v. *Dudley*, it seems that the criminal law would concede no exemption, on the ground of necessity, for such an act of homicide.

It is clear that no such ground of defence can be accepted in any case (1) where the evil averted was a less evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand[2]." Each particular instance, as it arises, must be considered upon its own merits; whether by a jury in forensic routine, or by the Crown as a matter of special grace.

In the only English case where this defence has been expressly raised, it failed[3]. Three men and a boy escaped in an open boat from the shipwreck of the yacht *Mignonette*. After having passed eight days without food, the men killed the boy in order to eat his body. Four days later, they were rescued by a passing ship. On their arrival in England,

[1] 3 Douglas 232.
[2] *Hist. Crim. Law*, II. 109.
[3] *Reg.* v. *Dudley and Stephens*, L. R. 14 Q. B. D. 273 (K. S. C. Cl).

two of the men were tried for the murder of the boy. Their counsel reminded the court that Lord Bacon had suggested[1] that if two shipwrecked men were clinging to a plank which was only sufficient to support one, and one of them pushed the other off, he would be exempt from any criminal liability, because his conduct was necessary to save his life. But the Court of Queen's Bench declared emphatically that there is no general principle of law which entitles a man to take the life of an innocent person in order to preserve his own. It was pointed out by the court that Lord Bacon's similar statement[2] that it would be no crime in a starving man to steal food to satisfy his hunger and so preserve his life, had been scouted by Sir Matthew Hale[3]; and if necessity could not excuse theft, it certainly could not excuse murder. The court appears to have been willing, if necessary, even to overrule Lord Bacon's dictum about the plank; but Sir J. Stephen considers that their actual decision does not go so far as to overrule it. For, as he points out, the accused man does no direct bodily harm to the other, but leaves him still the chance of getting another plank; whereas in the *Mignonette* case the boy was actually killed; and, moreover, by men who did it for the sake of avoiding a starvation which the jury only found to have been otherwise "*probable*," not otherwise "*inevitable*[4]."

[1] *Maxims*, reg. 5.

[2] Reg. 5. Cf. Grotius, *De Jure Belli*, I. 4. 7. 1, II. 2. 6. 2.

[3] Hale's *Pleas of the Crown*, 54. Much legal controversy has recently been aroused in France by a judgment in which the Court of Appeal at Amiens acted (April 28, 1898) upon Bacon's lenient principle. Hale's view seems, however, to be the one more generally adopted by French judges.

[4] Stephen, *Dig. Cr. Law*, Art. 33. He also maintains that the circumstances of *Reg.* v. *Dudley* distinguish its principle from many cases in which there is a choice of evils; for instance, from cases where an accoucheur finds it necessary to destroy a child at the approach of birth in order to save the mother (an act that is never made the subject of a prosecution). Still more readily would he distinguish it from those in which the question is not which one shall live, but whether any shall live; as where

From the scantiness of the recorded authorities upon this subject it will readily be seen that the defence of necessity, even if it be a possible one, is at least extremely rare. The question of its possibility can only be important in the few crimes where, as in capital offences, there is a prescribed minimum of punishment: for every judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty, wherever he has the power to do so.

Where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition. For if the object of punishment be only to deter, then it must be a useless cruelty to inflict or to threaten any punishment the threat of which cannot have the effect of deterring[1]. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed with favour[2].

To these three groups[3] of cases where unquestionably a criminal act goes unpunished for lack of the necessary *mens rea*, Blackstone adds a supposed fourth one:—"Where the will is too perfect to do wrong." For[4], by a totally unnecessary legal fiction, he ascribes the King's unquestionable immunity from criminal liability to an imaginary "perfection" in his will, which Blackstone supposes to render him incapable of *mens rea*. But it is clear that our law does not

three mountaineers are roped together, but two of them slip, and the third cuts the rope to save himself from being dragged to death with them.

[1] See Moriaud's able monograph, *Le délit nécessaire*. At the court-martial held (*Times*, July 28, 1893) in consequence of the collision in which the *Victoria* was sunk, it was shewn, from the official Directions, that naval discipline regards even disobedience to an Admiral's orders as being excusable by necessity, *e.g.*, the paramount necessity of not endangering the safety of a ship.

[2] *Commonwealth* v. *Brooks*, 99 Mass. 434; *State* v. *Wray*, 72 N. C. 253 etc. So too in the penal codes of Italy (s. 49) and Germany (s. 54).

[3] See above, p. 49.

[4] 4 Bl. Comm. 32.

really regard the King as incapable of committing crime; inasmuch as, though it will never punish him, it would readily punish, as an accessory before the fact, any evil counsellor who might prompt him to a crime. The King has indeed himself an exemption from liability; but it is sufficiently explained by the absence, in our Constitution, of any tribunal possessed of jurisdiction to try him. It is thus a mere matter of adjective law; and not the result of any fiction in our substantive law.

But, whichever be the proper branch of law to class it under, the exemption itself is dictated by a wise policy. Almost every nation has considered it necessary to clothe its Chief Magistrate with this immunity. (It is true that in the United States the personal responsibility of the President for any crimes he may commit is fully recognised[1]; but the particular circumstances under which the States framed their constitution sufficiently account for this unusual liability.) At the trial of Charles I, even the Parliament's counsel admitted[2] the correctness of a judicial dictum, of Henry VII's time, that "If the King should, in passion, kill a man, this would be no felony for which to take away the King's life."

The like immunity conceded to every foreign sovereign and his ambassadors and their suites, whilst resident in this country, must be remembered[3]. In some recent cases of the unlawful driving of motor-cars, it has had practical results.

[1] Constitution of U.S.A., art. II. s. 4. Cf. *The Federalist*, no. 69.
[2] 4 State Trials, 1034. Cf. Anson's *Law of the Constitution*, II. 4, 453.
[3] Hall's *International Law*, II. 4. 49, 50; 7 Anne c. 12.

CHAPTER V.

INCHOATE CRIMES.

We have seen that where there is merely *mens rea*, there is no crime at all. But though an *actus reus* is thus necessary, there may be a crime even where the whole of the particular *actus reus* that was intended has not been consummated If an assassin misses the man he shoots at, there is clearly no murder; but nevertheless a crime has been committed. For the law will punish acts that constitute even a very early stage in the preparations for an *indictable* crime[1].

But, just as the mere *mens rea* is not punished, so neither are the earliest conceivable stages of the *actus reus*. There is thus, as a general rule, (leaving out of view, at present, the anomalous case of Treason), no criminal liability where a *mens rea* has only been followed by some act that does no more than manifest the *mens rea*. Liability will not begin until the offender has done some act which not only manifests his *mens rea*, but also goes some way towards carrying it out. Three classes of merely incipient or inchoate crimes, which have proceeded far enough to become punishable, may be noted:—Incitements, Conspiracies, Attempts.

(1) In *Incitement*, the act takes the form of soliciting some other person to commit a crime[2]. This is a misdemeanor, even though that person never does commit the ultimate crime thus suggested to him[3]. If he do commit

[1] Stephen, *Dig. Cr. Law*, Arts. 48—51.
[2] *Reg.* v. *Higgins*, 2 East 5 (K. S. C. 88).
[3] *Reg.* v. *Gregory*, L. R. 1 C. C. R. 77.

it, the inciter becomes still more guilty; being liable as an "accessory before the fact[1]," if the suggested crime be a felony, and liable as a principal offender, if it be a misdemeanor.

(2) In *Conspiracy*[2], the mere agreement of two or more persons to commit a crime is regarded by the law as an act sufficiently proximate to the contemplated offence to render these persons guilty at once of a crime. Even a conspiracy to do no more than incite some one else to commit a crime, would be criminal.

(3) *Attempts* constitute the most common form of inchoate crime. They consist in some physical act which helps, and helps in a sufficiently "proximate" degree, towards carrying out the crime contemplated. It seems impossible to lay down any abstract test for determining whether an act is sufficiently proximate to be an "attempt." It is clear that mere preparations for the intended crime, antecedent to the actual commencement of the crime itself[3], do not amount to an indictable attempt. Thus if a man, who contemplates murder, buys a pistol and takes a railway ticket to the place where he expects to find his intended victim, these are mere acts of preparation, too remote from the actual offence to constitute an attempt. But if, on meeting the victim, he points the pistol at him and puts his finger on the trigger, he does acts which are a part of the offence of murder—and, similarly, of that of shooting with intent to wound[4]—and certainly will amount to an "attempt" to commit either of those two crimes.

So again, taking an impression in wax of the lock of a door in order to make a key to fit it, may constitute an

[1] *Infra*, ch. 6.

[2] A full account of the law of Conspiracy will be found later in this work, in Book II.

[3] *Per* Blackburn, J., in *Reg.* v. *Cheeseman*, L. and C. 140 (K. S. C. 85).

[4] *Reg.* v. *Duckworth*, L. R. [1892] 2 Q. B. 83.

attempt to commit burglary; for the *only* object of such a proceeding must be to open the door in question. But buying a box of matches would not be an act sufficiently proximate to the offence of arson to constitute an attempt to commit it; for it is an ambiguous act, not necessarily referable to that crime, or to any crime at all. On the other hand, actually striking one of the matches, for the purpose of setting fire to a haystack, would be a sufficient "attempt" to commit this arson[1]. And it will remain so, even if the match goes out—or is snatched away from the prisoner, or is thrown away by him on finding himself detected—before any hay has caught fire at all.

Another illustration of this dividing line may be found in cases relating to the publication of seditious or defamatory books. Merely to preserve such a book, even with a view to publish it, is not an attempt at publication[2]; but procuring such a book with intent to publish it, would be.

It was for a time thought that a person could not be convicted of an attempt unless the attempted act were possible. Thus for a thief to put his hand into a person's pocket which happened to be empty, was not regarded as amounting to an attempt to commit larceny[3]. This doctrine has, however, been definitely overruled[4].

The offence attempted may itself be only an inchoate form of crime. Thus a conviction may be obtained for an attempt to incite, or an attempt to conspire. But, as it is of the essence of an attempt to be itself merely inchoate, it will be a good defence to an indictment for an attempt if the prisoner can shew that he actually completed the in-

[1] *Reg.* v. *Taylor*, 1 F. and F. 511. Cf. *infra*, p. 251, note (1).

[2] *Dugdale* v. *Reg.*, 1 E. and B. 435; *Reg.* v. *Dugdale*, D. and P. 64.

[3] *Reg.* v. *Collins*, L. and C. 471. Nevertheless it was punishable as an "assault with intent to commit a felony" (*infra*, p. 158).

[4] *Reg.* v. *Brown*, L. R. 24 Q. B. D. 357; *Reg.* v. *Ring*, 61 L. J. R. (M. C.) 116 (K. S. C. 88).

tended crime. For, thereupon, the attempt became merged in the greater offence[1]; and he must be reindicted if he is to be punished. If, however, on the other hand, a man indicted for some crime turns out to have done no more than attempt it, it is now provided by statute[2] that he may, even on the original indictment, be convicted of the mere attempt; thus avoiding the trouble of a new indictment and a new trial.

At common law, every attempt to commit any crime, whether that ulterior crime be felony or misdemeanor, is itself a misdemeanor[3]; and is punishable with fine and imprisonment (to which hard labour may be added for a limited period). And by various statutes some particular attempts have been made felonies; thus, every attempt to murder is now a felony, and punishable with penal servitude for life[4].

[1] *Rex* v. *Higgins*, 2 East, at p. 20, *per* Grose, J.; *Reg.* v. *Meredith*, 8 C. and P.

[2] 14 and 15 Vict. c. 100, s. 9.

[3] *Reg.* v. *Hensler*, 11 Cox 570.

[4] 24 and 25 Vict. c. 100, s. 11.

CHAPTER VI.

THE POSSIBLE PARTIES TO A CRIME.

CRIMES are often grouped by English lawyers into three classes—Treasons, Felonies, and Misdemeanors. In the gravest, and also in the least grave, of these three, no legal distinction, either of substance or even of form, is drawn between the various recognised modes of taking part in the commission of them. For the guilt of even the slightest share in any Treason is regarded as being so heinous that it is needless to distinguish it from still deeper shades of guilt. And, on the other hand, no activity in a mere Misdemeanor is considered heinous enough to make it worth while to draw a formal distinction between it and any less prominent mode of taking part in the offence. Hence if a crime belongs to either of these two opposite extremes, all persons who are concerned in it in any way—whether by actually committing it, or only by keeping near in order to assist whilst it is being committed, or merely by suggesting its commission—are indiscriminately classed together by the law as being alike "principals" in the offence.

But the intermediate group of crimes, viz., Felonies, appeared to be neither so grave nor so trivial as to make[1] it useless to take some formal notice of the gradations of guilt that arise from the variety of ways in which men may be concerned in them. And in the case of Felonies these distinctions still continue to be drawn, though their practical

[1] See Stephen, *Hist. Crim. Law*, II. 221—241; *Digest Crim. Law*, Arts. 36—47; Pollock and Maitland, II. 507—509.

importance has now almost entirely disappeared. An accurate comprehension of them is, however, still of great value to the student as enabling him, not merely in Felonies but also in Treasons and Misdemeanors, to trace with precision the lines at which the law ceases to take notice of participation in a crime—the stages, in other words, where Complicity ends and Immunity begins. Four several ways of taking part in a felony are recognised:—(1) as a principal in the first degree, (2) as a principal in the second degree, (3) as an accessory before the fact, (4) as an accessory after the fact.

(1) By a *principal in the first degree,* we mean the actual offender—the man in whose guilty mind lay the latest blameable mental cause of the criminal act. Almost always, of course, he will be the man by whom this act itself was done. But occasionally this will not be so; for the felony may have been committed by the hand of an innocent agent who, having no blameable intentions in what he did, incurred no criminal liability by doing it. In such a case the man who instigates this agent is the real offender; his was the last *mens rea* that preceded the crime, though it did not cause it immediately but mediately. Thus if a physician provides a poisonous draught and tells a nurse that it is the medicine to be administered to her patient, and then by her administration of it the patient is killed, the murderous physician—and not the innocent nurse—is the "principal in the first degree[1]." Similarly, if a man sends a six-year-old child into a shop to steal something off the counter for him, the man and not the child will be principal in the first degree in this theft[2]. By like reasoning it has been decided that if you hand in to your master's book-keeper a lying statement of money matters, and he believes it and makes entry of it, you are yourself indictable for the offence of

[1] Kelyng 52 (K. S. C. 79); *Rex* v. *Saunders*, Foster 371 (K. S. C. 81).
[2] *Reg.* v. *Manley*, 1 Cox 104 (K. S. C. 78).

"falsifying" the master's account-books in which the untrue statement was so entered[1]. Even an animal may be employed as an "innocent agent." For, just as anyone who sets a dog upon people is himself guilty of assaulting them, so any one who should send his trained retriever to purloin meat from a butcher's stall, might be convicted of the larceny of the meat, as a principal in the first degree; and this, even though he were far out of sight when the dog took it.

There may, of course, be more than one principal in the first degree. Thus all the members of a gang of poachers may have fired simultaneously at the keeper who has surprised them. Or both the father and the mother of a little child may have together sent it into a shop to steal for them; or may have together concurred in starving it. And persons may be thus joint principals in the first degree, even though one of them commits his share of the crime in one town whilst his colleague commits his in quite a different one[2].

(2) A *principal in the second degree* is one by whom the actual perpetrator of the felony is aided and abetted at the very time when it is committed. (In early law he was not ranked as a principal at all, but only as a third kind of accessory—the accessory *at* the fact.) This subordinate principal may or may not be actually present at the scene of the crime. Instances of persons who aid and abet a felony at the place itself[3] are afforded by the seconds in a prize-fight which ends fatally; or even by mere spectators if they actively encourage such a contest. But a spectator's presence at a prize-fight does not of itself constitute sufficient encouragement to amount to an aiding and abetting[4], and therefore does not necessarily make him punishable as a party to it. On the other hand, a man may effectively aid

[1] *Reg.* v. *Butt*, 15 Cox 564.
[2] *Reg.* v. *Kelly*, 2 Cox 379.
[3] *Reg.* v. *Swindall*, 2 C. and K. 230 (K. S. C. 74). Contrast *Rex* v. *Mastin*, 6 C. and P. 396 (K. S. C. 77).
[4] *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534.

and abet a crime, and at the very moment of its perpetration, without being present at the place where it is perpetrated. Thus, when *A* is inside a house, committing a burglary, *B* and *C* may be waiting outside it, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the police[1]. A prize-fight will usually have sentinels thus on the alert. In a case in Ohio, a man who invited a shop-keeper to accompany him to a convivial gathering, and took care to keep him agreeably occupied at it while some accomplices broke into his shop, was held to have been giving, even at the moment of the burglary, a sufficiently effective assistance in it to render him a principal in the second degree[2].

An aider and abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose. Thus if burglars find themselves interrupted by the master of the house which they have broken into, and one of them shoots him, the other burglar will be in no way liable for this murder, unless they had jointly resolved to resist interruption at any cost[3].

(3) An *accessory before the fact* is a person who procures or advises one or more of the principals to commit the felony[4]. This definition requires from him an instigation so active that a person who is merely shewn to have acted as the stakeholder for a prize-fight, which ended fatally[5], would not be punishable as an accessory. The fact that a crime has been committed in a manner different from the mode which the accessory had advised, will not excuse him from liability for it. Accordingly if *A* hires *B* to poison *C*, but *B* instead kills *C* by shooting him, *A* is none the less liable as accessory

[1] Foster 350. Cf. *Reg.* v. *Griffith*, Plowden 97 (K. S. C. 78).

[2] *Breese* v. *State*, 12 Ohio 146.

[3] Foster 353.

[4] Therefore there can be no accessory before the fact in "voluntary" (*i.e.*, unpremeditated) manslaughter.

[5] *Reg.* v. *Taylor*, L. R. 2 C. C. R. 147.

before the fact to *C*'s murder[1]. But a man who has counselled a crime does not become liable as accessory if, instead of any form of the crime suggested, an entirely different offence is committed[2]. An exception, however, arises where the crime counselled was one which was itself likely to cause this other crime that actually was committed; for if, when *A* has hired *B* to murder *C*, *B* by mistake kills *C*'s twin brother *D* instead, *A* may be convicted as an accessory to *D*'s murder[3]. Yet in *Saunders' Case*[4], where one man had instigated another to give a woman a poisoned apple, but she innocently handed on this apple to her child, who died from eating it, there was held to be no such likelihood as would render the original instigator an accessory to the murder of the child.

The student should notice that in criminal law the word "principal" thus suggests the very converse of the idea which it represents in mercantile law. In the former, as we have seen, an accessory proposes an act, and the "principal" carries it out. But in the law of Contract, and in that of Tort, the "principal" only authorises an act, and the "agent" carries it out. Where the same transaction is both a tort and a crime, this double use of the word may cause confusion. For example, if, by an innkeeper's directions, his chambermaid steals jewels out of a guest's portmanteau, the maid is the "principal" in a *crime*, wherein her master is an accessory before the fact; whilst she is also the agent in a *tort*, wherein her master is the "principal."

As we have already seen, to participate in a treason or a misdemeanor in either the second or the third of the modes now enumerated would constitute, not only an act of crime but, an act which the law does not distinguish (as it does in the case of felonies) from that of the "principal in the first degree." It is wholly immaterial, for all technical

[1] Foster 369. [2] *Ibid.* [3] *Ibid.* 370.

[4] Plowden 475; Foster 371 (K. S. C. 81).

purposes, whether a misdemeanant was principal at the fact or before the fact. But we now proceed to a fourth and remoter degree of complicity, which in the case of misdemeanors involves no criminal responsibility at all[1]; and which even in the case of treasons was at one time regarded as not producing the full guilt of treason itself but only that of a Misprision—a mere misdemeanor and so not punishable with death[2].

(4) An *accessory after the fact* is a person who, knowing that a felony has been committed, subsequently shelters or relieves one of the felons (even one who was a mere accessory[3]) in such a way as to enable him to elude justice[4]. He may do this, for instance, by concealing a fugitive murderer in his house or supplying him with the means of escape[5], or by helping a convicted murderer to get out of prison. Active assistance to the felon is thus necessary[6]. Hence merely abstaining (however wilfully) from arresting a known felon, and so leaving him to make his escape, is not enough[7] to make the sympathiser guilty, as an accessory, of the felony itself. (But it does make him guilty of the specific misdemeanor of a Misprision of Felony. Similar merely passive connivance in a treason would, in like manner, be a Misprision of Treason[8]. For crimes so grave as felonies or treasons ought to be disclosed to a magistrate by every one who knows of them. But in the case of mere misdemeanors there is no such duty.) It should be noted that, since it is a wife's duty to aid her husband and to keep his secrets, she incurs no liability if, after he has committed a felony, she shields him from justice, however actively. But

[1] *Vaughan's Case*, Popham 134; *State* v. *Goode*, 1 North Carolina 463.
[2] 3 Coke Inst. 138.
[3] 26 Lib. Ass. 52.
[4] See 3 Coke Inst. 138; 4 Bl. Comm. 3.
[5] 2 Hawkins' P. C. c. 29, s. 26.
[6] *Reg.* v. *Chapple*, 9 C. and P. 355 (K. S. C. 82).
[7] Y. B. 9 Hen. IV. pl. 1.
[8] *Infra*, Book II.

a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony.

Even in felonies but little practical importance now attaches to the distinctions between the first *three* of these four classes of "accomplices"—(a term which the law applies to all the *participes criminis*, whatever their degree of "complicity" in the offence,—though popular use generally limits it to those who take only a minor part). For the maximum punishment prescribed for any given crime is the same in the case of all three classes. And similarly the mischievous rule of the old common law, that the accessories to a crime could not be convicted until their principal was convicted (though he perhaps might be acquitted utterly unjustly or might die before he could be arrested), has long ago been abolished by statute; so that now all accessories whether before or after the fact may be indicted even though the principal felon has not yet been convicted, or even is not amenable to justice[1]. Moreover, by a bold application of the principle that *qui facit per alium facit per se*, it has also been enacted that an accessory before the fact may even be indicted and convicted as himself a principal[2]. But the converse does not hold good; so, if a principal is indicted as an accessory he, even now, cannot be convicted.

In modern times, the only important surviving difference between the various grades of accomplices consists in the fact that a much more lenient punishment is awarded to the man who is only an accessory *after* the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, he is punishable with nothing more than two years' imprisonment, with or without hard labour; (except in the case of murder, where

[1] 24 and 25 Vict. c. 94, ss. 1, 3.

[2] 24 and 25 Vict. c. 94, s. 2. See *Reg.* v. *James*, L.R. 24 Q.B.D. 439 (K.S.C. 81).

the maximum punishment for an accessory after the fact is penal servitude for life).

It is scarcely necessary to say that a man may be accomplice in more than one way to the same act of crime; and thus he may be convicted on one count as an accessory before the fact, and on another count as an accessory after the fact.

CHAPTER VII.

THE CLASSIFICATION OF CRIMES.

PUBLIC wrongs, Pleas of the Crown, or—to use a phrase more familiar but more ambiguous—Crimes, may be arranged, according to their technical degrees of importance, in the following series of groups.

I. Indictable offences; *i.e.*, those which admit of trial by jury.

(1) Treasons,

(2) (Other[1]) Felonies,

(3) Misdemeanors.

II. Petty offences; *i.e.*, those which are tried summarily by justices of the peace sitting without a jury.

The word "Crime" is properly applicable to all these; and thus, for instance, in the Judicature Act[2] the expression "criminal cause or matter" includes them all. But sometimes more restricted senses have been adopted: as when Serjeant Stephen, in re-writing Blackstone's *Commentaries*, limits "crime" to offences that are indictable; or when Blackstone himself goes still further, and limits it to those indictable offences that are more heinous than misdemeanors[3].

The two groups, Indictable and Non-indictable, were originally quite exclusive of each other; but now they overlap to some extent. For, under the Summary Jurisdiction

[1] For (*infra*, p. 92) the word "Felony" in its most precise sense includes all Treasons.

[2] 36 and 37 Vict. c. 66, s. 47.

[3] 4 Bl. Comm. 1.

Act 1879, a few of the indictable offences *may* under certain circumstances be tried summarily[1] instead; whilst all such of the petty offences as are heinous enough to admit of a sentence of imprisonment for over three months *may* instead be tried on indictment[2].

The discussion of the distinction between indictable and non-indictable offences may conveniently be postponed until we reach the subject of Procedure[3], and have occasion to explain there the modern mode of summary trial which now so often takes the place of trial by jury. But the mode in which indictable offences themselves are subdivided springs from so noteworthy a historical origin[4], and produces so many important consequences, that the consideration of it does not admit of being similarly postponed.

Amongst indictable crimes, the common law singled out some as being so conspicuously heinous that a man adjudged guilty of any of them must incur—not as any express part of his sentence but as a consequence that necessarily ensued upon it—a forfeiture of property, whether of his lands or of his goods or of both. Such crimes were called "Felonies." The other, and lesser, crimes were known as "Transgressions" or "Trespasses"; and did not obtain their present name of misdemeanors until a much later date[5]. A felony is, therefore, a crime which either involved by common law such a forfeiture, or else has been placed by statute on the footing of those crimes which did involve it. (This definition, it will be seen, includes treason; and, accordingly, the Statute of Treasons[6] speaks of "treason or other felony." But the differences of procedure between cases of treason and those of other felonies are so numerous and important that treasons have usually to be spoken of

[1] 42 and 43 Vict. c. 49, ss. 10, 11, 12. *Infra*, Book IV.
[2] *Ibid.* s. 17.
[3] *Infra*, Book IV.
[4] See Pollock and Maitland, I. 284—286, II. 463—468, 509.
[5] *Ibid.* II. 510.
[6] 25 Edw. III. st. 5, c. 2.

apart; and hence, for brevity's sake, the term "felony" is commonly employed as exclusive of them.)

The very word "felony" has been said[1] to contain a reference to the forfeiture which the crime entailed, and to be derived from the words *fee*, *i.e.*, feudal holding, and *lon*, *i.e.*, price; felony thus being such a crime as "costs you your property." But according to the Dictionary of Prof. Skeat the word is derived from a Celtic root, meaning "evil"; (or, according to that of Dr Murray, from the Latin *fel*, "venom";) and at any rate it is akin to our English adjective "fell," as in Shakespeare's "fell and cruel hounds[2]."

Familiar instances of felonies are—murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape. Whilst the most conspicuous instances of misdemeanors are less heinous crimes like perjury, conspiracy, fraud, false pretences, libel, riot, assault. The differences between felonies and misdemeanors are no longer so numerous as they once were. Amongst those, however, that have now disappeared there are some which still require notice.

(1) Originally, as we have seen, every felony tacitly produced a forfeiture; whilst no misdemeanor did, and in extremely few misdemeanors could forfeiture be imposed even as an express part of the sentence. But all forfeitures for felony and treason were abolished by the Forfeiture Act 1870 (33 and 34 Vict. c. 23, s. 1).

(2) Originally all felonies (except petty larceny) were punished with death; whilst no misdemeanor was[3]. Hence the idea of capital punishment became so closely connected with that of felony that any statute making a crime a felony made it capital by mere silent implication; whilst in an enactment which created a mere misdemeanor even the

[1] 4 Blackstone Comm. 95. [2] Pollock and Maitland, II. 465.

[3] Heresy (though never a felony) was of course punishable with death; but it was an ecclesiastical offence with which the temporal courts had no concern.

widest general words could not suffice to make it capital[1], and nothing but the most express language would suffice.

(3) Originally, a felon could not, at his trial, call any witnesses in his defence[2], or have any counsel to defend him (except for the argument of mere points of law); whereas a misdemeanant, like a defendant in a civil case, could have both. These disabilities were removed in 1702 and in 1826 respectively.

But the majority of the ancient differences between felonies and misdemeanors still exist in the law of the present day. The discussion of most of these may be postponed until we reach the general subject of Procedure[3]; when we can more appropriately discuss those which relate to such matters as the mode of accusation[4], the procedure at the trial, and the disqualifications produced by a conviction. But there are some differences which can more conveniently be considered now.

(1) It is, as we have already seen[5], only in felonies that the distinction between the four classes of *participes criminis* is technically drawn, or the fourth class made criminal.

(2) When the Act of 1870[6] put an end, as we have seen, to the forfeitures which were formerly created by a conviction for treason or any other felony, it did not restore the offender's property free of all liabilities, but justly saddled him with certain burdens which the crime itself had brought about.

[1] Hence the Statute of Anne (7 Anne c. 12) which, in consequence of the unfortunate arrest of the Russian Ambassador, subjects those who violate an ambassador's privileges to "such pains, penalties, and corporal punishment *as the court shall think fit*" did not make it possible to punish this offence with death: though its framers may have hoped that "his Czarish Majesty," whom they avowedly were attempting to appease, would be unaware that its language would be construed thus restrictively. See Blackstone's *Commentaries*, I. 255.

[2] 1 St. Tr. 885, 1281, 1304.

[3] *Infra*, Book IV.

[4] 2 Hawk. c. 26, s. 3.

[5] *Supra*, pp. 83, 88.

[6] 33 and 34 Vict. c. 23.

Thus, by sec. 3, the court before which any person is convicted of treason or of felony, may order that he shall pay the costs of the case. No such order could be made at common law, either for these crimes or for misdemeanors; and no statute has been passed to allow such an order to be made in cases of misdemeanors (except for a few particular offences). On the same principle, sec. 4 of the Forfeiture Act enables the court before which any person is convicted of felony—but this section, unlike sec. 3, does not extend to cases of treason—to order that he shall pay damages, not exceeding £100, for any "loss of property" which the felony has occasioned; (as where cash has been given for a forged cheque). But for this enactment, the person who had suffered the loss would have had to incur the trouble and expense of bringing an action in some civil court to obtain compensation. French procedure has long permitted the intervention, in criminal proceedings, of a *partie civile*; so as to save expense and trouble by enabling one litigation to do the work of two. But the principle is so unfamiliar in England that it has not been extended to misdemeanors[1].

(3) As felonies were always heinous offences, the law regarded it as of great moment that the offender should be brought to justice. Hence whenever a felony has been committed, any one who, on reasonable grounds, suspects any person of being the offender, is permitted to arrest

[1] But in those light cases where any crime—whether felony or misdemeanor or even a mere petty non-indictable offence—has been committed under such extenuating circumstances (whether arising from the triviality of the act itself, or from the youth, good character, mental condition, etc. of the offender) that, although the charge is proved, the court thinks it inexpedient to inflict actual punishment, it may instead order him to pay "such damages for injury or compensation for loss" as it thinks reasonable. If the court is only one of summary jurisdiction, the sum ordered must not exceed £10; but if it be a court of assizes or quarter-sessions there is no limit, (not even that of the £100 prescribed in the Forfeiture Act). See s. 1 (3) of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17); and cf. p. 512 *infra*.

him forthwith. And any one who actually sees a felony committed is not only permitted, but required, to do his best forthwith to arrest the felon; and may use any degree of violence that may be necessary to attain that object. But in the case of misdemeanors the common law never permitted (and it is only in certain particular cases that modern statutes now permit) even the eye-witnesses of the offence to arrest the offender without first obtaining a magistrate's warrant to enable them to do so. Hence a man who steals a penny may be seized on the spot, since he is a felon. But a man who has obtained a herd of cattle by false pretences is only a misdemeanant, so the farmer had, at the common law, to let him go. On the same principle, the justices of the peace who committed a felon for trial, have always had authority to insist, if they thought fit, on his remaining in prison until the trial took place; though a person committed for trial for misdemeanor could, at common law, insist on being released on bail if he found sufficient sureties. By modern legislation, however, the discretion which justices possess in felonies has been extended to several of the most heinous misdemeanors[1]. The anxiety of the law to secure the punishment of felons led to the further rule that no person injured by a felony could bring a civil action against the felon, to recover compensation for his loss, until *after* a criminal prosecution had either taken place or (as by the death or the pardon of the offender) been rendered impossible. In misdemeanors, on the other hand, either the civil or the criminal remedy may be taken first; or indeed, in theory, both may be pursued simultaneously[2], though in practice such a course would never be prudent[3]. But it should be added that, even in the case of felonies, it is not altogether easy for a defendant to defeat

[1] 11 and 12 Vict. c. 42, s. 23.
[2] *Jones* v. *Clay*, 1 Bos. and Peel 191.
[3] Cf. *Rex* v. *Mahon*, 4 A. and E. 575.

a civil action by raising this defence that he has not yet been prosecuted for the wrong which is complained of. So audacious an attempt to 'take advantage of his own wrong' is not allowed by the courts to be raised in the form of an ordinary defence. Hence in recent years grave doubts have been occasioned as to the validity of this objection[1]. But the defence does certainly exist. It was distinctly recognised in 1886 in *Appleby* v. *Franklin*[2]; and, later, in the Irish case of *S.* v. *S*[3]. A defendant could probably set it up by a summons at chambers to stay the action; or the court itself might spontaneously refuse to hold the trial. The objection was never regarded as applying to actions (even though connected with the felony) in which the defendant was not the felon himself, or in which the plaintiff was not the injured party himself.

(4) The heinousness of felonies is vividly shewn by the legal disqualifications which arise from the infamy of being convicted of one. The convicted felon[4] cannot vote for or sit in Parliament, or hold military or civil or ecclesiastical office, until after he either has been pardoned or has worked out his sentence[5]. These disqualifications are not entailed by any misdemeanor.

The existence of so many differences, some of them still so important, between felonies and misdemeanors naturally suggests to the student that the former class of crimes are marked by some special gravity. Yet it is not easy for him at first sight to discover on what principle the separation has been made between the crimes which are allotted to the one class or to the other. It cannot depend—like the French classification into *crimes*, *délits*, and *contraventions*—upon the degree of dignity of the tribunal before which the

[1] See Pollock on Torts, 6th ed. p. 197. [2] L. R. 17 Q. B. D. 93.
[3] 16 Cox 567. See also L. R. 10 Ch. D. 667; 6 Q. B. D. 561; 7 Q. B. D. 554; 10 Q. B. D. 412. [4] Unless sentenced merely to imprisonment for twelve months or less, and without hard labour.
[5] 33 and 34 Vict. c. 23, s. 2.

offender is to be tried. For a man may be tried for larceny, which is a felony, before a police magistrate, and yet for mere misdemeanors he may be impeached before the House of Lords. Nor, again, can it depend upon the amount of evil actually caused by the offence. For perjury, though it may cause the death of an innocent person, is only a misdemeanor, whilst keeping a horse-slaughterer's yard without licence is a felony[1]. Nor, thirdly, can it depend upon the gravity of the punishment. For larceny, which is a felony, and false pretences, which is a misdemeanor, are punishable alike. And some misdemeanors, *e.g.*, præmunire, have been punished by confiscation and perpetual imprisonment, and the misdemeanor of conspiracy to murder is punishable with ten years' penal servitude; yet the felony of stealing mineral ores is only punishable with two years' imprisonment[2]. An arrangement which produces such anomalies as these, can only be explained by considerations purely historical. It must be traced back to ancient times, when certain particular offences were found to be of such frequency and gravity as to render it no longer safe to leave them to the chance of a prosecution, by the injured, in the forms of ordinary litigation. For the public safety it had become desirable to establish the machinery for a periodical public investigation by the Crown, through a jury of accusation provided for the purpose, into the question whether any offences of this deep dye had been committed. Hence arose what we now know as "Grand Juries." To facilitate their operations it became necessary to frame a precise legal definition of each of the offences that were to come within the scope of their inquiries. Every such offence became a felony. But the offences that were less grave, or less common, were for a long time left very loosely defined (as some of them still are, *e.g.*, conspiracy); and were never prosecuted

[1] 26 Geo. III c. 71. The object is to prevent stolen horses from being easily disposed of.

[2] 24 and 25 Vict. c. 96. s. 38.

in this "inquisitorial" mode, but were left as before to the "litigious" action of private persons, (though in later days that action would usually be nominally taken on behalf of the Crown). These latter offences (except where statutory enactment has since erected any of them into felonies) constitute our modern misdemeanors. They, said Bracton six hundred years ago, are tried like civil actions ("civiliter intentantur"); and even now, as Sir James Stephen says, a prosecution for misdemeanor is hardly distinguishable from an action for tort in which the King is plaintiff and which aims at punishment and not at damages. Thus, in a trial for misdemeanor, the juryman's oath is to "truly try the *issue* joined between our sovereign Lord the King and the *defendant*." But in a felony it is to "true *deliverance* make between our sovereign Lord the King and the *prisoner* at the bar." Hence it is easy to understand why, in so many respects, the older law assimilated the idea of misdemeanors rather to that of mere civil wrongs than to that of felony; as in the conspicuous instance of its requiring a Peer to be tried by the House of Lords if the charge is one of felony, but by a jury of mere commoners if it is one of misdemeanor. In the course of time, the analogies of civil procedure have gradually caused the litigious type of procedure to supersede the inquisitorial, even in the case of felonies. The influence of the old inquisitorial theory, however, still survives in the treatment of such crimes as still continue to be (as formerly every felony was) punishable with death. Thus, in cases of homicide, every person present at the killing is usually called by the Crown as a witness; and this even though he be near akin to the prisoner, or be sub-pœnaed by him, or be manifestly hostile to the Crown. Thus, in a case of poisoning, all the chemists who have made analyses for the Crown, alike those who thought they found poison and those who did not, may have to be called. In other words, it is and has always been the view of English

law that, when a man is being tried for his life, the Crown counsel are not "litigants" battling with the prisoner, but a royal commission of "inquirers" dispassionately investigating the truth[1].

We may add that long before the abolition, in 1870, of forfeitures for felony, they had ceased to be of any financial importance. The annual amounts received between 1848 and 1870 ranged only from £253 to £1317[2]. Most felons were poor; and the rich ones disposed of their wealth between arrest and conviction. The time had come for this change; and, indeed, for other allied reforms.

It is quite possible that, in a perfect Criminal Code, crimes would continue to be broken into two great divisions according to their greater or lesser heinousness[3]; and that particular incidents both of procedure and punishment would attach to the graver class. But, in English law, great objection may be taken both, as we have seen, to the illogical manner in which particular crimes have been placed in the one class or the other, and also to some of the incidents attached to one or other of the classes. Hence the Criminal Code Bill of a score years ago, in its earlier form, abolished altogether the distinction between felonies and misdemeanors; and though the last draft, that of 1880, retained the distinction, yet it removed nearly all its importance. For it proposed that some incidents now attached to felonies should be attached only to such crimes as are punishable with death or penal servitude; whilst a few of the other incidents were to be extended to all crimes; and other incidents, again, were to be wholly abolished. There can be little doubt that, of all parts of our criminal law, none is in greater need of a thorough reconstruction than that which concerns the classification into Felonies and Misdemeanors.

[1] See 8 C. and P. 269; and (*non*-capital) 1 C. and K. 650.

[2] Parliamentary Papers: 1864, no. 136; 1870, no. 125.

[3] Yet see Stephen's criticism, *Hist. Cr. Law*, II. 194—196.

BOOK II.

DEFINITIONS OF PARTICULAR CRIMES.

CHAPTER VIII.

HOMICIDE.

We have already shewn ample ground for not adopting, as the arrangement of our successive explanations of the various crimes known to English law, the technical classification into Felonies and Misdemeanors. All writers have found it necessary to classify crimes upon a very different and more scientific principle—viz., by reference to the various kinds of interests which the respective offences violate. Thus Blackstone arranged them into those that are committed against (1) religion; (2) the law of nations; (3) the sovereign executive power; (4) the rights of the public; and (5) the rights of private individuals, whether these rights relate to (*a*) the persons, or (*b*) the habitations, or (*c*) the ordinary property, of those individuals. And, very similarly, the proposed Criminal Code of 1880 classified crimes into (1) those against public order, (*e.g.*, treason); (2) those affecting the administration of law and justice, (*e.g.*, perjury); (3) those against religion, morals, or public convenience, (*e.g.*, blasphemy, nuisance); (4) those against the person or reputation of individuals, (*e.g.*, murder, libel); and (5) those against the rights of property of individuals, (*e.g.*, theft). But the clearest arrangement is that of Blackstone's modern editor, Serjeant

Stephen, who divides them simply into (1) offences against the persons of individuals, (2) offences against the property of individuals, (3) offences against public rights.

Following this last arrangement, our list of crimes must begin with those which affect the security of men's persons—employing here that much abused word, not in its ancient technical legal sense of "a subject of rights and duties[1]," but in the modern meaning of "the living body of a human being[2]." Of all such offences, that of homicide[3] is necessarily the most important. And, to every student of criminal law, homicide is a crime peculiarly instructive; inasmuch as in it, from the gravity of the fact that a life has been taken, a minuter inquiry than is usual in other criminal cases is made into all the circumstances, and especially into the wrong-doer's state of mind. Hence the analysis of the *mens rea* has been worked out in homicide with great detail; whilst in regard to many other offences it still remains uncertain what precise condition of mind the accepted definitions of them are to be interpreted as requiring.

It is not, however, every homicide that is criminal. And at one time those forms of homicide which were not criminal were subdivided into two species; (though the importance of the distinction has now disappeared). For the older lawyers distinguished between the homicides that were Justifiable, and those that were only Excusable. In the former the act was enjoined or permitted by the law, (the slayer thus really acting on behalf of the State); in the latter, the act carried with it some taint, however slight, of blameworthiness.

[1] See Holland's *Jurisprudence*, ch. VIII.

[2] This sense perhaps was brought into English law by Sir Matthew Hale; who has the grotesque phrase, "the interest which a *person* has in the safety of his own *person*." (*Analysis of the Law*, sec. 1.)

[3] See Stephen's *Hist. Cr. Law*, III. 1—107; *Dig. Cr. Law*, chs. XXIII., XXIV.

(A) The common law, from a very early stage in its history, regarded the four following cases of homicide as being strictly *Justifiable*; and therefore as involving no legal penalty whatever.

(1) The execution of public justice. Thus the hangman who carries out the sentence of a competent court incurs no criminal liability. The sheriff who burnt the martyrs Latimer and Ridley at the stake was accordingly in no danger, either under Mary or even under Elizabeth, of being himself convicted of murder for having so done. His immunity was due —not, as Blackstone[1] ascribes it, to a mere absence of *mens rea,* because his act was extorted by a compulsion of official duty which overbore his own reluctance to commit it—but to the entire absence of any *actus reus* at all. It was not a crime for him to carry out the sentence; nay, it would have been a crime, though it might at the same time have been an act of moral heroism, for him to refuse to carry it out.

(2) The advancement of public justice. Thus life may be innocently taken, if it be necessary for arresting a felon[2], or suppressing a riot, or preventing some crime of a violent character. On the other hand, when the "Hammersmith Ghost" was shot on its nocturnal round, the slayer was held guilty of murder; for the masquerader thus slain was not committing any forcible crime, or even a felony, but only a mere misdemeanor—that of nuisance.

(3) The defence of oneself against a wrong-doer. A man is justified in using force against an assailant, in defence of himself[3] or of his immediate kindred[4]; (and probably now-a-

[1] 4 Bl. Comm. 28.

[2] For early illustrations of this form of justifiable homicide see *Rex* v. *Leonin* (1221) in Maitland's *Select Pleas* 85 (K. S. C. 148), and *John Small's Case* (1828) in *Select Coroners' Rolls* 79 (K. S. C. 143). Cf. p. 285 *infra.*

[3] *Howel's Case,* Maitland's *Select Pleas* 94 (K. S. C. 139).

[4] *Reg.* v. *Rose,* 15 Cox 540 (K. S. C. 140).

days even of anyone else who actually needs his protection[1]). Hence if he has a reasonable apprehension of danger, and adopts none but reasonable means of warding it off, he will be innocent even though the wrong-doer be killed by the means thus adopted. But reasonable these means must be. Hence a person assaulted is not justified in using firearms against his assailant, unless the assault is so violent as to make him consider his life to be actually in danger[2]. On the other hand[3], where a man, after hurling a bottle at the head of one Mr Cope, had immediately proceeded to draw a sword, and Cope thereupon had thrown back the bottle with violence, Lord Holt held that Cope's action was justifiable; "for he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand."

But where the wrong-doer is not going so far as to assault a human being, but is only interfering unlawfully with property, whether real or personal, the possessor of that property, (though he is permitted by the law to use a moderate degree of force in defence of his possession), will usually not be justified in carrying this force to the point of killing the trespasser. For such a justification will not arise unless the trespasser's interference with the property amounts to a felony, and moreover to a felony of some kind that is violent, such, for example, as robbery, arson, or burglary[4]. The making an attack upon a dwelling, especially if it be made at night, is regarded by the law as equivalent to an assault upon a man's person[5]; for "a man's house is his castle." And even these violent felonies should not be resisted by extreme violence unless it is actually necessary;

[1] Foster 274; 3 Russell on Crimes 216.
[2] *Rex* v. *Sculley*, 1 C. and P. 319 (K. S. C. 139).
[3] *Mawgridge's Case*, Kelyng 128.
[4] *Rex* v. *Cooper*, Croke Car. 544 (K. S. C. 138).
[5] *Per* Holroyd, J., in *Rex* v. *Meade*, 1 Lewin 184.

thus firearms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest. Hence, *à fortiori*, the actual killing of a person who is engaged in committing any mere misdemeanor, or any felony that is not one of force, cannot be legally justified; any one so killing him will be guilty of a criminal homicide.

(4) There was some old authority for maintaining that under some circumstances a man might, for the preservation of his own life, be justified in taking away the life even of a person who was in no way a wrong-doer. Thus Lord Bacon[1], reviving the ancient problem which Cicero had cited from the Rhodian moralist Hecato, suggested that where two men, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both, and one pushes off the other, who consequently is drowned, the survivor will not be guilty of any crime. But, as we have seen, in *Reg.* v. *Dudley and Stephen*[2], the five senior judges of the King's Bench Division threw doubt upon Bacon's doctrine; and refused to recognise as justifiable the act of some shipwrecked sailors, who had killed a boy, in order to feed on his body, when scarcely any other hope of rescue remained[3].

The peaceful orderliness of modern times has of course greatly diminished the number of cases of justifiable homicide. Some three hundred felonious homicides take place in England every year; but less than a score of executions, and less than half-a-dozen other acts of justifiable homicide.

(B) Beyond the strictly justifiable cases of homicide there were other cases which the law regarded as merely *Excusable*, *i.e.*, as, similarly, not deserving to be made felonies and punished with death, but as nevertheless being in some

[1] Bacon's *Maxims*, 5; Cicero, *De Officiis*, III. 23; Puffendorf, *J. N. G.* 2. 6. 4.

[2] L. R. 14 Q. B. D. 273 (K. S. C. 61). *Supra*, pp. 75, 76.

[3] Bracton II. 284—286; 1 Hale P. C. 419–424; Stephen, *Hist. Cr. Law*, III. 77; Pollock and Maitland, *Hist. Eng. Law*, II. 471.

degree blameable. These accordingly were punished by the forfeiture of the offender's moveable property; though ultimately it became usual for the Crown to restore all these goods except the "deodand," (the instrument by which the killing had been effected[1]). We have here a relic of the rough Anglo-Saxon times in which the law treated almost all homicides, however heinous or innocent, as matters that must be expiated by the payment of a pecuniary *wer*. Thus, so late as 1118, the compiler of the so-called *Leges Henrici I.* gives it as still the Wessex rule, that for every homicide, whether intentional or even accidental, the *wergild* must be paid[2] to the family of the slain man. Even after a more discriminating legislation had recognised, under ecclesiastical influence[3], that the more heinous forms must be punished with death, some time had still to elapse before it was clearly settled what forms were on the other hand so innocent as not to deserve even a pecuniary penalty. Thus, in the thirteenth century, even the man who slew some one by mere accident still needed a royal pardon, though he received this pardon as a matter of course[4]. And subsequently it came to be settled that, even when pardoned, he would still have to forfeit not merely the deodand but all the rest of his chattels; (which, however, at that period were seldom of great value). Even if it were not to him that the deodand belonged, it nevertheless would still be confiscated, in order that it might be purged from the stain of blood by being "given to God" in pious uses. Hence it was exacted not only where a human agent was thus responsible for the death, as in the case of a man on

[1] Pollock and Maitland, II. 478.

[2] Cap. 70, s. 12. "Sive sponte aut non sponte fiant hæc, nihilominus tamen emendetur, *quæ enim per inscientiam peccamus, per industriam corrigamus.*" Pollock and Maitland, II. 469; and (Alfred's quaint 36th Law, as to various accidents caused by carrying a spear) I. 53.

[3] Glasson, *Histoire du droit de l'Angleterre*, II. 537.

[4] Pollock and Maitland, II. 478.

horseback accidentally riding over a man who was asleep on the highway, but even where death was due to some mere natural accident, as in the case of a man's falling from a boat and being drowned. The rule was

> "Whatever moved to do the deed
> Is deodand and forfeited."

But, in practice, the forfeiture of the deodand was not confined to things that had moved. A small boy fell into a pan full of milk and was thereby drowned; whereupon the pan was forfeited[1]. The deodand was usually sold by the King; the purchase money, or commutation money, received for it being devoted to pious uses for the soul that had died unabsolved. After the Reformation, the money was usually handed to the poor, or to the relations of the deceased. Thus when in 1716 the coroner's juries of Yarmouth declared a horse from which a man had been thrown, and a stack of timber which had fallen on a child, to be forfeited as deodands, the stack was ransomed for 30*s*., which was paid over to the child's father[2]. Deodands were not abolished until 1846[3]. But the general forfeiture of goods caused by excusable homicide had been abolished in 1828[4]; so homicides which down to that time had been classed as excusable ceased, thenceforward, to differ at all in their legal consequences from such as were fully justifiable. The merely excusable cases of homicide had been the two following.

(1) Where in any *chance-medley* (*i.e.*, "sudden combat") one of the combatants desisted from fighting, but the other continued his assault, and then the former one, having no other probable means of escape open to him, killed his assailant, the necessity of self-defence prevented the homicide from being a felony. But, as at first he was to blame for his share in the affray, the case was distinguished from the strictly "justifiable" homicide in which a person, who had been

[1] *Select Coroners' Rolls*, p. 50.
[2] Perlustration of Great Yarmouth.
[3] 9 and 10 Vict. c. 62.
[4] 8 and 9 Geo. IV. c. 31, s. 10.

assaulted when entirely passive, slew his assailant in self-defence. On the other hand, if the chance-medley had been continued by *both* the combatants down to the time when the fatal blow was struck, the homicide would have nothing to excuse it, and would be felonious—a manslaughter or possibly even a murder[1].

(2) Where one man killed another by *misadventure*—*i.e.*, in doing a lawful act, and with no intention of causing harm, and with no culpable negligence in the mode of doing it[2]—his act was held excusable. Thus where a man spun round with a boy in a frolic, and, on the boy disengaging himself, reeled against a woman and thereby caused her death, the case was held to be only one of misadventure[3]. So again, where a child of four, on being asked if he would like a drop of gin, twisted the glass out of the prisoner's hand and swallowed nearly all its contents, and died in consequence, it was held that the drinking this extraordinary additional quantity of the gin was the act of the child himself; and that the prisoner therefore had committed no felony[4]. A very important class of cases of mere misadventure are those in which death is accidentally caused by a parent or master, when engaged in the lawful act of giving a child, or scholar, or apprentice, reasonable chastisement with a reasonable instrument[5].

The right of the parent to punish his child is recognised by the Prevention of Cruelty to Children Act, 1904. By the older common law this right of correction was recognised even as against adult servants[6]. Similarly, every husband was formerly intrusted with the power of correcting

[1] *Rex* v. *Dyson*, R. and R. 523 (K. S. C. 89).

[2] Contrast *Reg.* v. *Jones*, 12 Cox 628 (K. S. C. 23) with Foster 265 (K. S. C. 27).

[3] *Reg.* v. *Bruce*, 2 Cox 262 (K. S. C. 136).

[4] *Rex* v. *Martin*, 3 C. and P. 211 (K. S. C. 137).

[5] *Combe's Case*, 9 Coke 76 a.; *Cleary* v. *Booth*, L. R. [1893] 1 Q. B. 465.

[6] *Rex* v. *Mawgridge*, 16 St. Tr. 57.

his wife by personal chastisement; but, as Blackstone tells us, in the politer days of Charles the Second this power of correction began to be doubted; though, he adds in a vein of humour, "the lower rank of people, *who were always fond of the Common Law*, still claim and exert their antient privilege[1]."

The right to punish a child exists of course only in the case of one who is old enough to be capable of appreciating correction; not, for instance, in that of an infant of the age of two and a half[2]. And, in all cases, the character and amount of the punishment that can be recognised as lawful will vary with the age and the sex and the apparent physical condition of the child. But where the punishment has clearly a lawful occasion, and is not unreasonable in the manner of its infliction or even in its amount, the fact that the child has died in consequence of it, will not render the parent or master who inflicted it guilty of a felonious homicide. Such a death may ensue where the child has some hidden peculiarity of structure that was unknown to the parent or master—such a defect, for instance, as the familiar "egg-shell skull" may render a slight blow fatal, or a hæmophilic boy may have such a tendency to bleeding that he dies from a flogging which might have been administered with impunity to ordinary pupils[3]. Similarly, quite apart from any chastisement, the peculiar physical formation of a person may easily lead to his death by misadventure. A slight push, which was only such as is usual in social intercourse, has, for instance, been known to cause the death of a man who by congenital malformation had only one kidney; a push, which an ordinary person would scarcely have felt, sufficed to arrest its physiological action, and the man died almost immediately.

[1] 1 Bl. Comm. 444.

[2] *Reg.* v. *Griffin*, 11 Cox 402.

[3] See the case cited in Poore's *Medical Jurisprudence*, p. 357.

Another class of cases of misadventure, of still greater practical importance, are those where death is accidentally caused in the course of some lawful game or sport. Thus, though an armed tournament was unlawful even in mediæval times, and a knight who killed another in such an exercise would usually be guilty of criminal homicide, yet it was otherwise if the King had commanded the particular tournament in question. In a struggle thus legalised by the royal order, the death of any of the combatants would be a case of mere innocent misadventure[1]. At the present day, all such exercises with naked swords would be illegal however licensed. But ordinary fencing, and, similarly, boxing[2], wrestling, football[3], and the like, are lawful games if carried on with due care. Everyone who takes part in them gives, by so doing, his implied consent to the infliction upon himself of a certain (though a limited) amount of bodily harm. But no one has the right to consent to the infliction upon himself of an excessive degree of bodily harm, such harm as amounts to "maiming[4]" him; and thus his agreement to play a game under dangerously illegal rules will, if he be killed in the course of the game, afford no legal excuse to the killer. (Nor has he even any right to consent to the production of such a state of affairs as will constitute a breach of the peace. For both these reasons, prize-fighting is held to be illegal; in spite of the two competitors having consented to take its risk). Thus not only is a *combat* illegal, produced by an actual desire to hurt, but so also is even a *contest*, for mere exhibition of strength and skill, if they are exhibited in a manner that is perilous. To wear boxing-gloves will not necessarily reduce the peril of boxing to within the legal limit, for they may be too slight for their purpose. And

[1] 4 Bl. Comm. 183.
[2] *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534.
[3] *Reg.* v. *Bradshaw*, 14 Cox 83 (K. S. C. 131).
[4] *Infra*, p. 146.

the question has recently been debated whether an illegal degree of peril is not created by the common Ten Seconds Rule; which, in making the non-resumption of the contest equivalent to a defeat, tempts a man to try to secure victory by reducing his opponent to a dangerously extreme degree of exhaustion.

Of course even the most lawful game will cease to be lawful as soon as anger is imported into it; and the immunity from criminal liability for those engaged in it will consequently at once disappear[1].

[1] *Reg.* v. *Canniff*, 9 C. and P. 359. The fact that the prisoner was playing in strict accordance with the well-accustomed rules of the game will help towards showing that he was not actuated by motives of anger; and, again, towards showing that the way in which he was playing was not so obviously perilous as to be illegal. Hence, for either of these purposes, these rules may be admissible evidence on behalf of the prisoner. But, on the other hand, if the prisoner was playing in violation of the rules, they are not thereby rendered admissible evidence against him. For it is not criminal, and not necessarily either dangerous or malicious, to break them. On this point the case of *Reg.* v. *Bradshaw* (*supra*, p. 110) may be compared with that of *Reg.* v. *Moore* (14 T. L. R. 229), where, in a game of Association football, the prisoner had killed a man by charging him from behind, in defiance of the rules.

CHAPTER IX.

FELONIOUS HOMICIDES.

If a homicide be committed under such circumstances as to be neither justifiable nor excusable, but a crime, it is not, and never was, a mere misdemeanor, but always a felony. The felony may, however, take any one of three forms:—

(I) *Felonia de se*; *i.e.*, a suicide that takes place under such conditions as to be criminal. (Thus a man who commits suicide when insane is not a *felo de se.*) The legal guilt is identical with that of either a manslaughter[1] or, as is usually the case, a murder: but the offender is, by the guilty act itself, placed beyond the reach of all ordinary legal punishment. An effort was, however, made by the common law, with some measure of success, to deter men from this crime by the threat of degradations to be inflicted upon the suicide's corpse[2], which, by a natural if unreasoning association of ideas, were often a potent deterrent; and also by threatening the forfeiture of his goods, a vicarious punishment which, though falling wholly upon his surviving family, was likely often to appeal strongly to his sense of affection. Thus the man who feloniously took his own life was at one time buried in the highway, with a stake through his body; and his goods were forfeited. The burial of suicides lost its gruesome aspect in 1824[3], when the original mode was replaced by the

[1] Stephen (*Digest*, Art. 249) makes *murderous* malice essential. But see Jervis on Coroners, 6th ed. p. 151; and 50 and 51 Vict. c. 71, sched. 2.

[2] "Criminals have been known to shrink from that part of their sentence which related to giving up their bodies to anatomy, more than from the doom of death itself, with all its terrors here and hereafter." Sir Walter Scott's *Journal*, 16th Jan. 1829.

[3] 4 Geo. IV. c. 52.

practice of burial between the hours of nine and twelve at night, without any service. In 1870, the confiscation of the goods of suicides was put an end to in the general abolition of forfeitures for felony[1]. And in 1882, the statute 45 and 46 Vict. c. 19 removed every penalty, except the purely ecclesiastical one that the interment must not be solemnised by a burial service in the full ordinary Anglican form. Even before the common law penalties of *felonia de se* were legally abolished, the popular disapprobation of them, which ultimately secured their abolition, had gone very far in reducing the number of cases in which they were actually inflicted. For it rendered coroners' juries eager to avail themselves of the slightest grounds for pronouncing an act of suicide to have been committed during a fit of insanity, and consequently to have involved no felonious guilt. So if the evidence disclosed any source of anxiety which might have given the deceased a motive for his fatal act, anxiety was declared to have unsettled his mind; if, on the other hand, no motive could be found, then the very causelessness of his act was declared to be itself proof of his insanity. It is to be regretted that this practice of "pious perjury"—to borrow an indulgent phrase of Blackstone's—became so inveterate that it has survived the abolition of those penalties which were its cause and its excuse. In every thousand cases of suicide upon which coroners' inquests are held, there are only from twelve to fourteen in which a verdict of *felo de se* is returned[2]. This seems to shew that, in cases of suicide, juries are still in the habit of pronouncing on utterly inadequate grounds a verdict of Insanity; forgetting that whilst such a verdict no longer removes any appreciable penalty, it may throw upon the family of the deceased an undeserved stigma, gravely affecting their social or matrimonial or

[1] 33 and 34 Vict. c. 23.

[2] Criminal Judicial Statistics of England and Wales, issue of 1896, p. 141; issue of 1900, p. 137.

commercial prospects. For the same progress of thought which has made men averse to vicarious and to degrading punishments, has also made them quick to trace the physical and mental influences of heredity.

In spite of the abolition of the old penalties, the intentional suicide of a sane person is still regarded by the law as an act of crime. Accordingly, every attempt to commit suicide is an indictable misdemeanor[1]. Hence, in 1901, where a girl, in attempting to shoot herself, accidentally shot her lover as he was trying to snatch the revolver from her, though the jury on her trial at the Central Criminal Court somewhat perversely insisted upon acquitting her on an indictment for murder, she was found guilty on one for attempting to commit suicide, and received a sentence of imprisonment. Another consequence of the criminality of suicide is that if two persons agree to die together, but only one succeeds in putting an end to his life, the survivor is guilty of murder, as a principal in the second degree[2]. Or, putting it more generally, anyone who successfully instigates another to commit suicide is guilty of murder[3]. For the same reason, if a person, in making an attempt to commit suicide, should accidentally kill any of the bystanders, he will be guilty at least of manslaughter; and, in most cases, of murder[4].

Statistics shew that for many years past the proportion of suicides to population has been steadily increasing. In 1905 it was quite half as high again as in 1873[5], having risen from about 63 per million to about 101. Attempted suicides have increased very much faster[6].

We now pass to those cases of felonious killing in which the person slain is not the slayer himself but someone else.

[1] *Vide supra*, p. 82. *Reg.* v. *Doody*, 6 Cox 463.
[2] *Rex* v. *Dyson*, Russell and Ryan 523 (K. S. C. 89).
[3] *Commonwealth* v. *Bowen*, 13 Mass. 356 (K. S. C. 91).
[4] *Commonwealth* v. *Mink*, 9 Lathrop 422 (K. S. C. 110).
[5] Criminal Judicial Statistics of England and Wales, issue of 1907, p. 48.
[6] *Ibid.* 1900. It is singular that, in both England and France, summer

(II) Manslaughter. This felony consists in killing another person unlawfully, yet under conditions not so heinous as to render the act a murder. It is spoken of by Hale and Blackstone as being committed "without malice, either express or implied." We shall better avoid confusion of language if we say, instead, "without any of those *more guilty* forms of malice which amount to Murderous Malice." For malice, in its wide legal sense (that is to say, *mens rea*), is essential to every crime.

Manslaughter admits of subdivision into two sharply distinguished forms; the so-called "voluntary" and the so-called "involuntary."

(*a*) *Voluntary* manslaughter is that which is committed with the "voluntas," the intention, of causing to another person some illegal harm—it may be a merely slight or a grave or even a fatal harm. Where some trivial blow is struck, with the intention of producing mere momentary pain, but death unexpectedly results from it, then, if it is an unlawful blow, the striker will be guilty of manslaughter. (We have already seen that this merely accidental homicide would not have been criminal at all if the blow had been a lawful one, as in correcting a scholar.) An illustration of such a manslaughter is afforded when the carrying out of some slight practical joke, which seemed harmless enough, unhappily results, perhaps through blood-poisoning, in the death of the victim of it[1].

Where, however, death is produced by a blow which was not a mere trivial one, but was likely to cause serious bodily harm, the crime may be either a manslaughter or a murder, according to the circumstances. For though, if the assailant had received only a slight provocation, or none at all, his crime will amount to murder; yet if he had received

and not winter is the period of the maximum of suicides (Cr. Jud. St. of 1896, p. 25).

[1] *Rex* v. *Sullivan*, 7 C. and P. 641 (K. S. C. 116).

gross provocation, it may amount to no more than a manslaughter. This may be the case even though the fatal injury were inflicted by a deadly weapon and with the full intention of killing[1]. For the provocation which the slayer had received may have been so sudden and so extreme as to deprive him (for the time being) of his ordinary powers of self-control[2]; and consequently to render his violent feelings of hostility less blameable—blameable enough, still, to merit punishment, but not to merit the punishment of death. The suddenness of the homicidal act is thus an essential condition of this mitigation of his guilt. The fact that the weapon he used was one which he already had in his hand at the time of receiving the provocation, may be important as evidence that the blow was not premeditated[3]. Still more favourable will it be for the prisoner if he can shew that he used no weapon but that with which nature had provided him—his own clenched fist.

In manslaughter of the "voluntary" kind, as there can have been no premeditation, there can never be an accessory before the fact; (a remark which has sometimes been, too hastily, extended to manslaughters in general). There will usually, too, be no appreciable interval of time between the one man's act of provocation and the other man's act of killing. If, however, some time do intervene, it is nevertheless possible that the slayer's conduct during it may be such as to shew that the ungovernable passion, aroused by the provocation, still continued throughout that time and was truly the cause of the fatal blow[4]. On the other hand, it is of course also possible that his conduct during the interval may have been so calm as to shew that his resentment had cooled down; and consequently that the provocation originally

[1] *Reg.* v. *Wild*, 2 Lewin 214 (K. S. C. 116).
[2] *Rex* v. *Lynch*, 5 C. and P. 324.
[3] See *Rex* v. *Thomas*, 7 C. and P. at p. 818.
[4] *Rex* v. *Thomas*, 7 C. and P. 817.

received cannot have the legal effect of reducing the killing to something less than murder[1].

The provocation upon which any such sudden intent to kill is formed must, as we have said, be a gross one, if it is to have the result of reducing the killing to a manslaughter. Mere words, however insulting and irritating, are never regarded by the law as gross enough to produce this result. Indeed very few forms of provocation that do not involve some physical assault are regarded as sufficiently gross to produce it. One of those few may be found in the case of a husband who detects a man in the very act of adultery with his wife, and kills him on the spot[2]. (But had the man been committing not mere adultery but rape—*i.e.*, had the wife not been a consenting party—the husband's act in killing him might not have had even the guilt of manslaughter and might have been a Justifiable Homicide.) On the other hand, the anger inspired in a husband by the mere discovery that in the past an act of adultery had been committed by his wife, would not constitute in law a provocation sufficiently gross to extenuate to manslaughter his consequent shooting of the adulterer.

Even an actual assault is not provocation enough unless it be of a very violent or very insulting character. Thus if a man receives from a *woman* a slap in the face, the provocation is not gross enough for this purpose; though if she had struck him violently on the face with a heavy clog, so as to draw blood, that would have been sufficiently gross[3]. And a blow which was given lawfully, *e.g.*, for the purpose of preventing a violent assault on some third person[4], can never be an adequate provocation. Although, as we have seen, mere words, however insulting, are never regarded as

[1] *Rex* v. *Hayward*, 6 C. and P. 157.
[2] *Rex* v. *Maddy*, 1 Ventris 158 (K. S. C. 111).
[3] *Rex* v. *Stedman*, Foster 292.
[4] *Rex* v. *Bourne*, 5 C. and P. 120.

amounting of themselves to a sufficiently gross provocation, yet, where they accompany a blow, they may be taken into account in estimating the degree of provocation given by the blow. They may thus have the effect of rendering an assault, which, if committed silently, would have been trivial, a provocation gross enough to reduce a homicide into a manslaughter. An unlawful imprisonment, or an unlawful arrest, may clearly be a sufficient provocation to reduce to manslaughter an act of killing inflicted by the actual person imprisoned or arrested[1]. But it will never have this effect as regards a homicide committed by other persons in their sympathy with him. Hence if bystanders try to rescue him, and kill someone in the attempt to do so, they will be guilty of murder[2].

One of the most common cases of voluntary manslaughter is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated—or, at least, was not premeditated on the part of the prisoner—persons fall to fighting; and then, in the heat of the moment, either of them (for the combat affords matter of provocation to each) inflicts some fatal injury on the other, the slayer will not be guilty of more than a manslaughter. Thus where a soldier, who was defending himself against an insulting mob by brandishing his sword and by striking some of them with the side of it, finally struck one of them a blow on the head which killed him, the judges held that it was only manslaughter[3]. Similarly where, in the course of a quarrel, one French prisoner-of-war threw another to the ground, and then stamped on his stomach and thereby killed him, it was held to be only a case of manslaughter; because there had been no interval of time between the blow which threw the deceased to the ground

[1] *Rex* v. *Stevenson*, 19 St. Tr. 846.
[2] *Reg.* v. *Allen*, Stephen's *Dig. Cr. Law*, Art. 245 and note 9.
[3] *Rex* v. *Brown*, 1 Leach 176 (K. S. C. 112).

and the stamping on his body[1]. If, however, the quarrel subside for a time, and then be resumed by one of the combatants, it usually will not afford him any palliation for a fatal blow struck after the resumption of the conflict[2]. It certainly will not do so if he employed the interval in arming himself for the renewal of the combat[3]. Hence if, when two persons quarrel, they proceed to fight then and there, and one of them is killed, the offence is only manslaughter[4]; but if, instead of thus fighting at the moment of the quarrel, they agree to hold a duel on the following day, and one of them is killed in that duel, the slayer will be guilty of murder[5].

The various effects of provocation in cases of "voluntary" homicide may be summed up thus. A grave provocation reduces to manslaughter the act of killing, even though it be committed with some dangerous instrument, such as was likely to *kill* (*e.g.*, a pestle). But a slight provocation (α) leaves the act of killing with a dangerous instrument still a murder; though it (β) reduces the act of killing with a slight instrument, such as was likely only to wound, (*e.g.*, a cudgel), to manslaughter. Provocation never reduces a homicide to misadventure, if the fatal blow were unlawful, (*e.g.* resentful); though it may if that blow were only a lawful act of self-defence.

(*b*) *Involuntary* manslaughter is that which is committed by a person who brings about the death of another by acting in some unlawful manner, but without any intention of killing, or even of hurting, anyone. This may happen in three ways:—

(1) He may be doing some act which is intrinsically unlawful; (probably it must not[6] be so unlawful as to be

[1] *Rex* v. *Ayes*, Russell and Ryan 167 (K. S. C. 113).
[2] *Reg.* v. *Kirkham*, 8 C. and P. 115.
[3] *Rex* v. *Mason*, Foster 132.
[4] *Rex* v. *Walters*, 12 St. Tr. 113.
[5] *Reg.* v. *Cuddy*, 1 C. and K. 210.
[6] *Infra* p. 136.

a felony, for then the homicide might not be a mere manslaughter but a murder). Thus a person commits manslaughter if he accidentally kills some one else by conduct which amounts to a misdemeanor; (as by taking part in an unlawful assembly[1] or in an unlawful game). And this rule has usually been regarded as holding good whenever the unlawful act which accidentally produced the death amounted to even a mere civil tort. But there is some modern authority for confining the doctrine to such torts as are likely to cause bodily hurt[2]. Thus in *Reg.* v. *Franklin*[3], the view was expressed by Field, J., with the concurrence of Mathew, J., that the mere fact that the death was brought about in the commission of a civil wrong ought not to be enough. But this view was not taken by the late Mr Justice Stephen[4]; who adhered to the older doctrine that any tort will suffice, even though it be one that did not seem fraught with any danger.

(2) He may be leaving unperformed some act which it is his legal duty to perform. Thus if a railway passenger is killed because the pointsman fell asleep and forgot to move the points, this pointsman will be guilty of manslaughter; (if, on the other hand, he had purposely left the points unmoved, it would have been murder). Where the engine-man at a colliery left his steam-engine in the charge of an ignorant boy, and this lad's inexperience in managing it brought about the death of a miner, the engine-man was held guilty of manslaughter[5] But the connexion between the omission and the fatal result must not be too remote[6].

[1] *Reg.* v. *McNaughten*, 14 Cox 576.

[2] Cf. the similar tendency in murder to say that a *merely* felonious act will not suffice, *infra* pp. 137–8.

[3] 15 Cox 163 (K. S. C. 118).

[4] *Dig. Cr. Law*, 6th ed. Art. 231.

[5] *Reg.* v. *Lowe*, 3 C. and K. 123 (K. S. C. 132).

[6] See *Reg.* v. *Hilton*, 2 Lewin 214 (K. S. C. 133); *Reg.* v. *Rees*, C. C. C. Sessions Papers, cxv. (K. S. C. 133).

In these two instances, the legal duty of acting arises from special circumstances whereby the particular person concerned had taken it upon himself. It will usually arise thus; for the community at large are seldom under any legal duties but negative ones, duties to abstain from the commission of certain acts. "If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him. I am under no legal obligation to protect a stranger[1]." But the law itself does in some cases impose upon a special class of persons some duty of a positive character, a duty of acting. Thus parents are responsible for the care of their children; and consequently, if a child's death is caused, or even accelerated, by a parent's gross neglect in not providing sufficient food or clothing for his child, the parent will be guilty of manslaughter.

The mere fact that there was some degree of negligence on the parent's part, will not suffice. There must be a wicked negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not[2]. Of course if the wickedness went to such a point that the parent intentionally left his child to starve to death, he would be guilty not of manslaughter but of murder[3]. At common law, it was necessary for the prosecutor in these cases to shew that the negligent parent was in actual possession of means which enabled him to provide for the child[4]. But now, under the Prevention of Cruelty to Children Act 1904—4 Edw. VII. c. 15, s. 23 (2)—neglect to provide for the maintenance of a child is not excused by the being unable to do so without resorting to the Poor Law authorities. A cognate question has frequently arisen as to the liability of a parent

[1] *Per* Hawkins, J., in *Reg.* v. *Paine*, (*The Times*, Feb. 25th, 1880).
[2] *Per* Brett, J., in *Reg.* v. *Nicholls*, 13 Cox 75.
[3] *Per* Hawkins, J., in *Reg.* v. *Paine*, loc. cit.
[4] *Reg.* v. *Edwards*, 8 C. and P. 611.

for neglecting to procure medical aid for his children. The rule of law appears to be, that his wilful omission to provide medical aid for his child is such a neglect as comes within the provisions of the Act of Parliament; and it would seem that it was punishable even at common law. Hence, if it occasions or accelerates the death of the child, the parent will be guilty of manslaughter. (And this will be the case even when the omission is due to a conscientious or religious objection to the use of medicine[1].) The evidence must however shew positively that death was in fact caused (or accelerated) by the omission; it is not sufficient to shew a mere possibility that proper medical treatment might have saved (or prolonged) the child's life[2]. This liability for neglect is not confined to parents. Any adult who undertakes the care of a person who is helpless, whether it be through infancy[3] or even through mere infirmity[4], will similarly be guilty of manslaughter if this person should die through his *wicked* neglect. And, on the same principle, if a doctor, after having actually undertaken the treatment of a patient, wickedly neglects him, and he dies in consequence of this neglect, the doctor will be guilty of manslaughter.

But the degree of negligence must be not merely a culpable but a criminal one. It is not enough to shew that there was such carelessness as would support a civil action for negligence; there must be "a wicked negligence[5]." Yet however extreme a man's negligence may have been, he still will not be answerable for a death which even full diligence on his part would not have averted or delayed[6].

[1] *Reg.* v. *Senior*, L. R. [1899] 1 Q. B. 283.

[2] *Reg.* v. *Morby*, L. R. 8 Q. B. D. 571.

[3] *Reg.* v. *Nicholls*, 13 Cox 75.

[4] *Reg.* v. *Instan*, L. R. [1893] 1 Q. B. 450.

[5] *Reg.* v. *Paine*, loc. cit. Cf. also *Reg.* v. *Finney*, 12 Cox 625 (K. S. C. 120); *Reg.* v. *Noakes*, 4 F. and F. 920; *Reg.* v. *Doherty*, 16 Cox, at p. 309. But contributory negligence is *not*, as in civil cases, a defence; *infra*, p. 128.

[6] *Reg.* v. *Dalloway*, 2 Cox 273 (K. S. C. 134).

(3) He may be doing some act which is quite lawful, but nevertheless may be doing it negligently[1] and therefore unlawfully; as where a volunteer indulges in rifle practice in the immediate vicinity of houses[2]. Thus if death be caused in chastising a child who is under your authority, and whom you have no intention to kill, the case will be (*a*) one of *Manslaughter*, if the extent of the punishment were unreasonable, although the instrument used was a reasonable one. On the other hand, it will be (*b*) one of *Misadventure*, if both the extent and the instrument were reasonable; but (*c*) of *Murder*, if the instrument used was utterly unreasonable[3]. And similarly if death be caused by a workman throwing down rubbish from a roof, though without his having any idea of doing hurt to anyone, there are the same three alternatives. For (*a*) it will be *Misadventure*, if the matter occurs in a village, and the workman has called out to give warning before throwing the materials down. But (*b*) it will be *Manslaughter*, (1) if, though it were only in a village, the workman did not even call out; or (2) if it were in a town and he only called out, but did not take the further precaution of looking over. Finally, (*c*) it will be *Murder*, if it were in a town, and he were so grossly negligent as not even to call out[4]. In like manner, if a person die from being plied with liquor by his boon-companions, the degree of their legal responsibility will depend upon the motives with which they acted. If from mere unreflecting conviviality, the homicide would only be one of misadventure; if from a deliberate "practical joke," it would be at least a manslaughter[5]; and, in case that an extremely excessive amount of liquor was administered, or that there

[1] *Rex* v. *Knight*, 1 Lewin 168 (K. S. C. 130).

[2] *Reg.* v. *Salmon*, L. R. 6 Q. B. D. 79.

[3] *Anon.* 1 East P. C. 261.

[4] *Rex* v. *Hull*, Kelyng 40 (K. S. C. 125).

[5] *Reg.* v. *Packard*, C. and M. 236 (K. S. C. 137). *Rex* v. *Martin*, 3 C. and 211 (K. S. C. 137).

was a desire to produce death[1], it would be murder[2]. Manslaughter is often spoken of as "the most elastic of crimes"; for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide. The punishment[3] is penal servitude for life or not less than three years, or imprisonment for not more than two, or a fine. The annual number of cases of manslaughter is a little under, and that of murders a little over, one hundred and fifty; as against nearly three thousand suicides.

(III) Murder. The word 'murder,' from the Germanic *morth*[4], originally denoted (1) a secret killing. Hence the name was applied to the fines imposed by William the Conqueror upon any hundred where a Norman was found secretly killed. The dead man was presumed to be a Norman unless there was express 'presentment of Englishry.' After these fines (then already nearly obsolete) were abolished by Edward III. in 1340, the word 'murder' necessarily lost its earlier meaning, and came to be applied as a name for (2) the worst kinds of homicide. (Those kinds of homicide which, as they were neither justifiable nor even cases of misfortune or self-defence, were capital felonies, but yet were not of so bad a kind as to be called murders, remained undistinguished by any particular name.) Finally, when by 23 Hen. VIII. c. 1 the benefit of clergy was largely taken away from 'murder of malice aforethought,' the term 'murder' soon became (3) limited, as it still is, to the form of homicide dealt with by this statute. This phrase 'malice aforethought' was not new. It had been in use since the thirteenth century[5] (even before the abolition of Englishry); for 'malitia excogitata' (or 'praecogitata') was familiar under Henry III. as one of the tests of unpardonable

[1] *Reg.* v. *Paine*, Sessions Papers, XCI. 587—592; *The Times*, Feb. 25, 1880.
[2] *Reg.* v. *Packard.* [3] 24 and 25 Vict. c. 100, s. 5.
[4] For the history of the word "murder" see Sir James Stephen's *Hist. Crim. Law*, III. 40; and Pollock and Maitland, II. 483.
[5] See Pollock and Maitland, II. 478, 484.

(*i.e.*, capital) homicide. But at the time when the phrase began to be used the word 'malitia' meant rather the wrongful act intended, than the intention itself; still less had it any particular reference to that special form of evil intention, viz., hatred, which 'malice' now popularly denotes[1].

Murder, in this third and final sense, may be defined in antique phraseology which has been classical ever since the time of Lord Coke, as (α) unlawfully (β) killing (γ) a reasonable creature, who is (δ) in being and (ϵ) under the King's peace, (ζ) with malice aforethought either express or implied; (η) the death following within a year and a day[2]. Of these seven constituents, the first, viz. "unlawfulness," distinguishes murder from all non-felonious homicides, whether ranked as justifiable or only as excusable; and the sixth, "malice aforethought," distinguishes it from those unlawful homicides which rank only as manslaughter. The second, third, fourth, fifth and seventh are as necessary in manslaughter as in murder. But, as it is in cases of murder that they have received the fullest judicial consideration, it has seemed more appropriate to postpone until now our discussion of them. We will consider the last six points successively.

(1) *Killing*. In murder, as in manslaughter, a man may be held liable for a homicide which he effected, not by any direct violence, but only through some protracted chain of consequences; his own last act in it being remote, both in time and in order of causation, from the death which it brought about. This is vividly illustrated by two old cases mentioned by Blackstone[3]. In one, a "harlot" abandoned her new-born child in an orchard, and covered it over with no better protection than leaves. Birds of prey being then common in England, a kite struck at the infant with its claws, and thereby inflicted wounds which caused the death of the child. The woman was arraigned of murder and

[1] Pollock and Maitland, II. 467. [2] 3 Coke Inst. 47.
[3] 4 Bl. Comm. 197.

executed[1]. In the other case, a son who had taken his sick father from town to town in cold weather, and thereby hastened the old man's death, was indicted for the capital felony[2]. Yet in murder, just as we saw in the case of Attempts[3], there is a point at which the law refuses to continue to trace out chains of causation; and beyond which, therefore, any act is regarded as too remote to produce guilt. But here, as before in Attempts, it is impossible to lay down any general rule for fixing this point; and the utmost that can be done is to suggest it approximately by illustrative instances. The most noteworthy is the rule that killing a man by perjury is not murder[4]. That rule, though it has been doubted by some lawyers, has the sanction of so great a criminal judge as Sir Michael Foster[5]; and is supported by the fact that, even in an age when the definition of murder was less narrowly construed than now and when judges were more pliant to the Crown, the lawyers of James II. did not venture to indict Titus Oates, the inventor of the imaginary "Popish Plot," for the murder of the men whose lives he had sworn away. Yet their desire to see him expiate his guilt by death, if it were legally possible, is sufficiently evidenced by the sentence passed (and executed) upon him when he was prosecuted for perjury—viz. two floggings of about 2,000 lashes each, one from Aldgate to Newgate and the other from Newgate to Tyburn. It used, again, formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, the present tendency of legal opinion is to regard such a cause of death as not too remote for the law to trace[6].

[1] Crompton's *Justice* 24 (K. S. C. 92).

[2] Y. B. 2 Ed. III. f. 18, Hil. pl. 1 (K. S. C. 92).

[3] *Supra*, p. 80.

[4] *Rex* v. *Macdaniel*, Leach 52 (K. S. C. 97). But the Roman jurists treated as a murderer the perjurer who thus "falsum testimonium dolo malo dixerit, quo quis publico judicio rei capitalis damnaretur." *Dig.* 48. 8. 1. Killing by witchcraft was not murder; though made capital in 1562.

[5] Foster's *Crown Law*, 130.

[6] Stephen, *Hist. Crim. Law*, III. 5.

An act may amount to an unlawful killing, either as a murder or a manslaughter, even though it be so remote in the chain of causes that it would not have produced death but for the subsequent acts or omissions of third parties[1]; unless this conduct of the third parties were either wilful or, at least, unreasonably negligent[2]. The rule extends even to similar intervening conduct on the part of the deceased victim himself[3]. The rationale of it is, that a person who brought the deceased man into some new hazard of death may fairly be held responsible if any extraneous circumstances (that were not intrinsically improbable) should convert that hazard into a certainty. An illustration, noteworthy both for the rank of the criminal and also for the fact that twenty years elapsed between his crime and his trial, may be found in the case of Governor Wall[4]. He was tried and executed, in 1802, for the murder of Serjeant Armstrong, on the island of Goree, by sentencing him to an illegal flogging; though the illness thus caused would not have produced death, but for Armstrong's own rash act in drinking spirits whilst he was ill. So in another case[5], a man, who had been severely cut across one of his fingers by an iron instrument, refused to allow the finger to be amputated, although warned of the danger he was running. Lock-jaw came on, and he died. His assailant was convicted of murder; Maule, J., holding that it made no difference whether the wound was instantly mortal in its own nature, or became a cause of death only by reason of

[1] Contrast *Reg.* v. *Hilton*, 2 Lewin 214 (K. S. C. 133), with *Reg.* v. *Lowe*, 3 C. and K. 123 (K. S. C. 132).

[2] 1 Hale P. C. 428.

[3] See *Governor Wall's Case*, 28 State Trials 51; and contrast *Reg.* v. *Holland*, 2 M. and R. 351 (K. S. C. 93) with *Reg.* v. *Sawyer*, C. C. C. Sessions Papers, CVI. (K. S. C. 94). Cf. *Commonwealth* v. *Hackett*, 2 Allen 141. In Scottish law, the corresponding rule does not thus include the conduct of the deceased or the mere *omissions* of third parties.

[4] Loc. cit.

[5] *Reg.* v. *Holland*, 2 M. and R. 351 (K. S. C. 93). Cf. a similar case in C. C. C. Sessions Papers, LXXVI. 259.

the deceased's not having adopted the best mode of treatment. Much more recently, it was held by Baron Martin[1] that if an engine-driver negligently causes a collision, and a passenger, on seeing this collision to be imminent, jumps out of the train and is killed by the jump, the liability of the engine-driver for the manslaughter of this passenger will depend on the question whether a man of ordinary self-control would have thus jumped, or only a man unreasonably timid. In like manner, Quain, J., held that if a man who lay drunk in the middle of a road, and did not get out of the way of a vehicle, were driven over by it and killed, the driver would be indictable. For "contributory negligence" is no defence in criminal law[2].

(2) *A reasonable creature.* Here "reasonable" does not mean "sane" but "human." In criminal law a lunatic is a *persona* for all purposes of protection, even when not so for those of liability.

(3) *In being, i.e.,* not a mere unborn child[3]. There can be no murder of a child which dies either before being born or even whilst being born; only of one that has been born, and, moreover, born alive. For purposes of criminal law, —and also for those of property law, *e.g.*, to become a holder of property and so transmit it again to new heirs, or to enable the father to obtain courtesy of his wife's lands—mere *birth* consists in extrusion from the mother's body, *i.e.*, in having "come into the world." Partial extrusion is not sufficient; if but a foot be unextricated, there can be no murder; the extrusion must be complete, the whole

[1] *Reg.* v. *Monks*, C. C. C. Sessions Papers (1870), LXXII. 424.

[2] C. C. C. Sessions Papers, LXXVII. 854. See *Reg.* v. *Dant*, L. and C. 567 (K. S. C. 126) *per* Blackburn, J.; *Reg.* v. *Kew*, 12 Cox 455 (K. S. C. 185) *per* Byles, J.; *Reg.* v. *Swindall*, 2 C. and K. 230 (K. S. C. 74) *per* Pollock, C. B. The only ruling on the other side is by Willes, J., in *Reg.* v. *Birchall*, 4 F. and F. 1087.

[3] 3 Lib. Ass. pl. 2; 22 Lib. Ass. pl. 94.

body of the infant must have been brought into the world[1]. But it is not necessary that the umbilical cord should have been severed[2]. And to be born *alive* the child must have been still in a living state after it had quitted the body of the mother. Hence that life then still existed must be actually proved; and this may be done by giving evidence of any cry, or breathing, or pulsation, or movement, after extrusion. But it is not necessary that the child should have continued to live until it was severed from the mother; or even until it began to breathe[3]. For a child may not breathe until some time after full extrusion[4]; though, on the other hand, infants sometimes breathe, and even cry, before they are fully extricated.

The birth must thus precede the death; but it need not also precede the injury[5]. Thus an act which causes a child to be born much earlier than in the natural course, so that the child when born is rendered much less capable of living and accordingly soon dies, may itself amount to murder[6].

It may be convenient here to digress for a moment from murder to another offence; and to mention that on the indictment of any person (whether the mother or not) for the murder of a new-born infant, the jury may find no sufficient proof of murder, and yet may find proof of the statutory offence of "endeavouring by secret disposition of its dead body, to conceal its birth" (24 and 25 Vict. c. 100, s. 60). For in this crime, unlike murder, it is immaterial whether the child was born *alive* or not. In such cases they are permitted by the statute to convict of this offence of Concealment of Birth, without the delay of any fresh trial or fresh indictment. This statutory offence (which, of course,

[1] *Rex* v. *Poulton* (1832), 5 C. and P. 330. Not so in India.
[2] *Rex* v. *Crutchley*, 7 C. and P. 814; *Reg.* v. *Reeves*, 9 C. and P. 25.
[3] *Rex* v. *Sellis* (1837), 7 C. and P. 850.
[4] *Rex* v. *Brain*, 6 C. and P. 349.
[5] *Rex* v. *Senior*, 1 Moody 346.
[6] *Reg.* v. *West*, 2 C. and K. 784.

may itself form the subject-matter of an express indictment) is a misdemeanor; and is punishable by two years' imprisonment, with hard labour. It should be noted that it is no crime to conceal a birth merely from some particular individual alone. "There would be a hardship in punishing a girl for concealment from her master, if there had been no concealment from her mother[1]."

(4) *Under the King's peace.* "The King's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions[2]." Yet there was a time when the King's peace was only partial in its operation, and merely supplemented that national peace which it finally supplanted. The national peace, which apparently had its origin in the sanctity of the homestead, was protected only in the local courts; and these were weak. The King's peace on the other hand was enforced with vigour by royal officers of justice. At first it applied only in certain holy seasons, or to persons to whom it was specially granted by the King, or to places which were under the King's special protection (such as the precincts of his house and the four great roads). These limits, however, soon became indefinitely extended. "The interests of the King and of the subject conspired to the same end[3]." The King profited in the way of fees, and the subject was anxious to appeal to the one authority which could not anywhere be lightly disobeyed. Accordingly, "after the Conquest, the various forms in which the King's special protection had been given disappear, or rather merge in his general protection and authority[4]." But even then the King's peace did not arise throughout the nation at large until he proclaimed it; and it lasted only till his death. On the death of Henry I., as

[1] Mr Justice Wright, *Draft Criminal Code for Jamaica*, p. 108.
[2] 1 Blackstone Comm. 350.
[3] Pollock, *Oxford Essays* (The King's Peace), p. 83.
[4] *Ibid.* p. 87.

the chronicler tells us, "Then was there seen tribulation in the land; for every man that could forthwith robbed another." Edward I. was away in Palestine when his father died; and, to avoid the confusion which would otherwise have arisen, the magnates themselves proclaimed the King's peace, in spite of his absence. Henceforward, even the King's death was never regarded as suspending the royal peace.

A man attainted of praemunire was not under the King's peace; and therefore, until 5 Eliz. c. 1, it was not murder to kill him[1]. On the other hand, to kill an outlaw was murder[2]; and even a condemned criminal[3] or an alien enemy[4] is under the King's peace. Hence an alien enemy cannot lawfully be killed except in the actual course of true war. In such, of course, he may; so it appears that if the captured crew, on board a prize brought into British waters, should endeavour to release themselves from their British captors, and in the consequent struggle one of the captives should be killed by one of the captors, the homicide[5] would not be felonious.

The law (as we are often told) is no respecter of persons. Without being universally true, this is a principle which has always applied with special force to the law of Homicide. Thus the villein could not be killed by his lord; nor could the slave, even in Anglo-Saxon times, be killed by his master, for the laws of Alfred inflicted a fine on the master who murdered his slave, and this at a time when most homicides admitted of being atoned for by mere payment of a fine. The King's peace was powerful to protect both villein and slave from the extremity of tyranny. It is instructive to notice that, even in much more recent times, a West Indian legislature imposed on masters no severer responsibility than Anglo-Saxon legislation had done in their dealings with the

[1] Y. B. 2 Ed. III. fo. 6, pl. 19.
[2] 1 Hale P. C. 433.
[3] Y. B. 35 H. VI. 57; *Commonwealth* v. *Bowen*, 13 Mass. 356 (K. S. C. 91).
[4] 1 Hale P. C. 433.
[5] *Per* James, L.J., in *Dyke* v. *Elliott*, L. R. 4 P. C. 184.

lives of their slaves. Thus one of the Acts of Barbadoes[1] ran as follows: "If any slave under punishment by his master, for running away or any other misdemeanor towards his master, unfortunately shall suffer in life (!) or member, no person whatsoever shall be liable to a fine. But if any man out of wantonness or cruel intention shall wilfully kill a slave of his own, he shall pay into the public treasury £15 sterling."

(5) *Malice aforethought.* The preceding elements in the definition of murder are common to all forms of criminal homicide; but this fifth point is the distinctive attribute of those homicides that are murderous. When, as we have seen[2], the legislature determined to take away the "benefit of clergy" from the most heinous cases of homicide, it adopted the already familiar notion of "malice aforethought" (*malitia praecogitata*) as the degree of wickedness which should deprive a homicidal "clerk" of his ancient right to escape capital punishment. The phrase is still retained in the modern law of murder; but both the words in it have lost their original meanings. For the forensic experience of successive generations brought into view many cases of homicide in which there had been no premeditated desire for the death of the person slain, yet which seemed heinous enough to deserve the full penalties of murder. These accordingly, one after another, were brought within the definition of that offence by a wide judicial construction of its language. Hence a modern student may fairly regard the phrase "malice aforethought" as now a mere arbitrary symbol. It still remains a convenient comprehensive term for including all the very various forms of *mens rea* which are so heinous that a homicide produced by any of them will be a murder. But none the less it is now only an arbitrary symbol. For the "malice" may have in it nothing really

[1] No. 329, p. 125.

[2] *Supra*, p. 124.

malicious; and need never be really "aforethought," except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired. The word "aforethought," in the definition, has thus become either false or else superfluous. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and its popular) meaning[1]. A desire for the death of the individual who was killed—or, as for distinctness' sake it may be termed, "Specific Malice"—is not essential to murder. Blackstone, indeed, in his treatment of this crime, sometimes uses the word Malice as if in this narrow sense; but at other times he includes under it, and more correctly, other states of mind far less guilty. For there are six several forms of *mens rea* which have been held to be sufficiently wicked to constitute murderous malice. They are the following:

(i) Intention to kill the particular person who, in fact, was killed. This, of course, is the most frequent of all the six forms.

(ii) Intention to kill a particular person, but not the one who actually was killed[2]. If a man shoots at *A* with the intention and desire (or, as Bentham would express it, the "direct intention") of killing *A*, but accidentally hits and kills *B* instead, this killing of *B* is treated by the law not as an accident but as a murder. In old legal phrase, *malitia egreditur personam*; the *mens rea* is transferred from the injury contemplated to the injury actually committed. Austin[3] has pointed out that such a murderer may have had any one of three mental attitudes with regard to the prospect of this latter injury. He may have—

(*a*) Thought it probable that he would hit *B* instead of *A*; and have risked doing so, though feeling no desire

[1] See Prof. E. C. Clark's *Analysis of Criminal Liability*, pp. 86—90.

[2] *Reg.* v. *Salisbury*, Plowden 100 (K. S. C. 102).

[3] *Jurisprudence*, Lect. xx.

at all that *B* should be hit. Austin classes this as an "intention"; and Bentham gives it the specific name of "*indirect* intention." But in ordinary parlance it is not called "intention" at all; because there was no desire of killing *B*.

(*b*) Thought it improbable that he would do so. This, Austin denominates "rashness."

(*c*) Not thought of it at all. This, Austin denominates "heedlessness."

(iii) Intention to kill, but without selecting any particular individual as the victim. This has been conveniently called "universal malice." It is exemplified by the case put by Blackstone, of a man who resolves to kill the next man he meets and does kill him[1]; and by the more frequent and more intelligible case of Malays who madden themselves, with hemp, into a homicidal frenzy, and then run "amok"; and by that of the miscreant who, a dozen years ago, placed an explosive machine on board an Atlantic liner about to sail from Bremerhaven, in order to get the money for which he had insured part of the cargo. It is also exemplified by such atrocities as those attributed to the early settlers in Queensland, who are said to have rubbed strychnine into the carcases of sheep and then placed them in the bush, in hopes of their being eaten by the aborigines.

(iv) Intention only to hurt—and not kill—but to hurt by means of an act which is intrinsically likely to kill. There is an old case of a park-keeper who, on finding a mischievous boy engaged in cutting some boughs from a tree in the park, tied him to his horse's tail, and began to beat him on the back; but the blows so frightened the horse that it started off and dragged the boy along with it, and thus injured him so much that he died[2]. The park-keeper was

[1] 4 Bl. Comm. 200.
[2] *Rex* v. *Halloway* (1628), Cro. Car. 131 (K. S. C. 103).

held to be guilty of murder. So recently as 1885 a very similar case was tried at the Lewes Assizes. In it, a cow-boy had tied a child, who annoyed him whilst he was milking, to one of the hind legs of a cow; but the cow took fright at this, and started off, and in its course dashed the child's head against a post. Here, the jury, with the approval of the judge, convicted the prisoner of manslaughter only. The case is of course distinguishable from Halloway's; inasmuch as the cow, being both a less sensitive and a less active animal than the horse, was not so likely to do a serious injury. But the more lenient verdict is probably to be attributed less to this consideration than to the general tendency of modern tribunals to relax the severity of the old law of murder.

We have already seen that even a parent or master, legally entitled to inflict corporal punishment upon a child, will be guilty of murder if he should, however unintentionally, kill the child by inflicting such punishment in some mode which was obviously likely to cause death[1]. Thus in *Rex* v. *Grey*[2], where a blacksmith was charged with the murder of his apprentice by striking him on the head with a bar of iron, it was held that the use of so dangerous an instrument "is all one as if he had run him through with a sword." And, similarly, a mother who had punished her child by stamping on its body, and had thereby killed it, was held guilty of murder[3].

(v) Intention to do an act which is intrinsically likely to kill, though without any purpose of thereby inflicting any hurt whatever. Such cases are usually due to the state of mind which Austin specifically terms "rashness[4]." Of this character is the intention of any workman who carelessly throws things off the roof of a house in a town, without

[1] *Supra*, p. 123.
[2] Kelyng 64 (K. S. C. 105).
[3] Cited in *Rex* v. *Grey*.
[4] *Supra*, p. 134.

looking over the edge to see if anyone is likely to be struck, or giving any warning[1]. We may add, as an instance of this fifth form of *mens rea*, Blackstone's case of the "unnatural" son who carried his sick father about, out of doors, in cold weather, which hastened the old man's death[2]. (This latter case, the printers of some thirteen successive editions of Stephen's *Commentaries* have unwittingly represented as if it had been one of a deliberate intention to kill, by printing "rich" instead of "sick"!)

To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves. It certainly is felt by juries to be so. This was forcibly shewn at the trial of Leon Serné, at the Central Criminal Court in 1887[3]. He set fire to his house in the Strand, which he had insured for considerably more than its value; and in the fire his two boys perished. He had been a kind father; and he had no intention of causing the death of the boys. On an indictment for their murder, he was acquitted. The acquittal seems to have been due simply to the jury's dislike of the doctrine of "constructive" malice; for when indicted, in the following month, for arson, he was convicted, (and was sentenced to twenty years' penal servitude). Yet if guilty of arson, he undoubtedly was legally guilty of murder.

(vi) (The older authorities add), Intention to commit a felonious act even though it be one unlikely to kill.

The oldest text-books had extended this principle to any *unlawful* act, but Sir Michael Foster limited it to *felonious* acts. Since his time, however, the effect of the rule, even as thus limited, has become enlarged, in consequence of various assaults and other acts having by statute been made

[1] *Supra*, p. 123. *Rex* v. *Hull* (1664), Kelyng 40 (K. S. C. 125).

[2] *Supra*, p. 126. Y. B. 2 Ed. III. f. 18, Hil. pl. 1 (K. S. C. 92).

[3] *Reg.* v. *Serné*, 16 Cox 311 (K. S. C. 106).

into felonies[1]. The illustration which Foster[2] gives of this sixth rule is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander. This, according to his view, would be murder[3]; though if the intent had been merely to kill (and not to steal) the fowl, or if the bird aimed at had been a mere sparrow, the homicide would only have been manslaughter, as the act intended would not be a felony. Similarly, if a thief gives a man a push with intent to steal his watch, and the man falls to the ground and is killed by the fall—or if a man assaults a woman, with intent to ravish her, and she, having a weak heart, dies in the struggle—such a homicide would, according to Foster's rule, be murder[4].

Yet to treat such cases as murder seems an excessive severity indeed. The reluctance of the judges in *Lad's Case*[5], as early as 1773, to treat death caused by a rape as murder, shews that the severity has long been regarded as impolitic. Both Stephen, J.[6], and Huddleston, B., instructed juries that the Court for Crown Cases Reserved would probably not uphold it. The draft Criminal Code omitted it. The modern tendency is thus towards a limitation of the rule to such felonies as are likely to cause death[7]. In that case it would sink into a mere case of our last mentioned rule, No. (v); and homicide resulting from any felony which was intrinsically *unlikely* to cause death would not be murder at all, but only a case of "involuntary" manslaughter[8].

It is highly to be desired that some authoritative decision

[1] See Stephen's *Dig. Crim. Law*, p. 411.

[2] Foster's *Crown Law*, 258.

[3] See the remarks of Blackburn, J., in *Reg.* v. *Pembliton*, L. R. 2 C. C. R. at p. 121 (K. S. C. 159). And see 2 F. and F. 582.

[4] *Per* Stephen, J., in *Reg.* v. *Serné*, 16 Cox 311 (K. S. C. 106).

[5] Leach 96.

[6] In *Reg.* v. *Serné*.

[7] See the judgments of Stephen, J., in *Reg.* v. *Serné*, and of Bramwell, B., in *Reg.* v. *Horsey*, 3 F. and F. 287 (K. S. C. 109); and Stephen, *Hist. Crim. Law*, III. 79.

[8] *Supra*, p. 119.

should be given as to this alleged sixth form of murderous malice; were it only for the sake of making it clear how a judge ought to deal with the too-frequent cases in which death results from an abortion which has been procured feloniously, yet in such a manner as seemed to involve no appreciable risk to the woman's life[1]. Formerly the judges regarded it as clear law that even such cases amounted to murder, and they passed sentences of death accordingly[2]. But in recent years these sentences have usually been commuted by the Crown[3]. Thus the sentences passed in two such cases at the summer assizes of 1901, (at Durham on June 28, and at Nottingham on July 8), were immediately afterwards commuted. The desire to avoid this unseemly divergence between the letter of the law and its practical operation recently led Bigham, J.[4], in such a case, to direct a jury that if they thought the prisoner could not reasonably have expected death to result, they might convict him of a mere manslaughter; and Darling, J.[5], to urge a grand jury to ignore the murder and accuse only of endeavouring to procure abortion.

Some books include, amongst the cases of malice that thus give the character of murder to homicide produced by acts that were *not* likely to kill, one form of intention which would not even be felonious. Thus, to the intent to commit a felony, they add the intent knowingly to oppose by force an officer of justice, when engaged in arresting or imprisoning an offender. Sir James Stephen, for example, maintains

[1] As to the slightness of the risk involved in the induction of an abortion, when performed with an expert's skill, see Fothergill's *Midwifery*, ed. 1900, p. 166. [2] *Rex* v. *Russell*, 1 Moody 356; *Reg.* v. *Gaylor*, D. and B. 288.

[3] As in *Reg.* v. *Culmore*, (C. C. C. Sessions Papers, XCII. 553, *Times* August 9, 1880), where Hawkins, J., in passing sentence, had said, "That the offence amounts to wilful murder, is the law as it at present stands; *and as, in all human probability, it will exist in time to come.*"

[4] *Reg.* v. *Whitmarsh*, 62 J. P. 711. See, again, *Times*, May 16, 1903.

[5] Chester Assizes, *Times*, March 11, 1899.

that even if the opposition took no more violent form than merely that of tripping up the officer, yet, should his fall accidentally kill him, the case would be one of murder[1]. But he appears to have drawn this severe doctrine merely from general language used in the old authorities; and there is, as he admits, no decision, nor even an express dictum of any judge, to be cited in support of it. In all the decided cases in which officers were killed, the actual means appear to have been intrinsically dangerous ones. Hence, in view of the modern tendency to narrow even the accepted rules as to constructive malice in murder, it may well be doubted whether the Court of Criminal Appeal would support this less definitely established doctrine.

The existence of these six various forms of "murderous malice" shew it to be much wider than mere "malice" in the popular sense, viz., ill-will; though much narrower than malice in the technical legal sense, viz., *mens rea.* Every intentional homicide is *primâ facie* presumed to have been committed with a murderous malice[2]; so that the defendant has the burden of shewing, if he can, that the circumstances were such as to reduce it to a manslaughter or a non-criminal homicide. But he may, of course, do this even by mere cross-examination of the Crown witnesses themselves. As regards the malice which is to be imputed to the various members of a group of wrong-doers when one of them commits a homicide, the rule is that, if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is, in law, done by all. Hence if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member

[1] *Dig. Cr. Law,* Art. 224. Illustration 11.

[2] See *Rex* v. *Thomas,* 7 C. and P. 817; and the trial in Massachusetts, in 1850, of Prof. Webster, of Harvard University, for the murder of Dr Parkman (Bemis's Report, p. 457). Cf. 8 C. and P. 42, 117.

of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired[1].

(6) *A year and a day.* "Day" is here added merely to indicate that the 365th day after that of the injury is to be included. Such an indication was rendered necessary by an old rule that, in reckoning a year from the doing of any act, the year was to be taken as beginning on the day on which this act was done[2].

The doctrine that a charge of murder could not be sustained unless the death thus ensued within a limited period after the injury that caused it, was a wise precaution in view of the defectiveness of medical science in mediæval times. But no modern case seems to have arisen in which it has been judicially considered; and some medical writers have suggested that at the present day the Court of Criminal Appeal might be inclined to treat it rather as a rough practical warning to be given to juries than as a definite rule of law. Still Sir James Stephen, who was fully alive to the modern advances of medical jurisprudence, seems to have felt no doubt that the rule still retains its imperative character; and it was deliberately preserved by the framers of the draft Criminal Code of twenty years ago.

The punishment of murder is death. In early times, those murders which constituted an act of petit-treason (*e.g.*, where a person was murdered by his wife or servant, or a bishop by one of his clergy) received an enhanced punishment. The offender, instead of being taken in a cart to the scaffold, was dragged thither on a hurdle; and, if a woman, was not hanged but burned, as in the case of Catherine Hayes, in 1726, familiar to readers of Thackeray. By 31 Vict.

[1] See *Reg.* v. *Macklin*, 2 Lewin 225 (K. S. C. 100).

[2] Hob. 139. But *now* see *Radclyffe* v. *Bartholomew*, L. R. [1892] 1 Q. B. 161.

c. 24, s. 2, every execution *for murder* must take place within the prison walls, before such persons only as the sheriff may admit. It should be noted that this enactment does not extend to the other three offences which still continue to be punishable with death, viz.:—treason, piracies that are accompanied by any act which endangers life[1], and the arson of a royal dockyard or man-of-war[2], or of any ship in the port of London[3]. But, since 1828, petit-treason has been entirely assimilated to ordinary murder[4].

As murder is so heinous an offence, the legislature has enacted severe penalties for even mere incipient approaches to it. Thus any conspiracy to murder, though it still remains only a misdemeanor, is by statute punishable with ten years' penal servitude[5], a far higher maximum of punishment than is allowed in the case of many felonies. And every attempt to commit a murder is now made by statute[6] a felony, and is punishable with penal servitude for life.

In concluding this subject, it may be added that murder affords a noteworthy exception to the general legal rule that "criminal jurisdiction is territorial[7]." Every nation tries and punishes all crimes committed in its own territory (or on its own ships), whether committed by its own subjects or by foreigners. Conversely, on the same principle, a nation usually does not concern itself with crimes committed anywhere else, even though committed by its own subjects. But to this latter branch of the rule, homicide has been made an exception in English law, by a succession of statutes commencing as far back as Henry VIII. The enactment now in force is 24 and 25 Vict. c. 100, s. 9; under which the courts of any part of the United Kingdom may try a British

[1] 7 Wm. IV. and 1 Vict. c. 88.
[2] 12 Geo. III. c. 24, s. 1; 7 and 8 Geo. IV. c. 28, ss. 6, 7.
[3] 39 Geo. III. c. 69, s. 104.
[4] 9 Geo. IV. c. 31, s. 2.
[5] 24 and 25 Vict. c. 100, s. 4.
[6] *Ibid.* ss. 11, etc.
[7] *Macleod* v. *Att.-Gen. of N. S. W.*, L. R. [1891] A. C. 455.

subject for *murder or manslaughter* committed by him anywhere outside the United Kingdom, whether within or without the Empire, provided it were on land. The power thus does not extend to homicides committed on a foreign ship. It is immaterial whether the person killed were a British subject or not. (It may be convenient to add here that similarly bigamy, when committed by a British subject, even in a foreign country may, by virtue of s. 57 of the same statute, be tried in the United Kingdom.)

CHAPTER X.

OFFENCES AGAINST THE PERSON THAT ARE NOT FATAL.

CRIMES of this class are of two sharply distinguished types, the sexual and the non-sexual; the one springing from lust, the other from anger.

To these offences that are of the former type, a very brief reference will be sufficient for the purposes of the present volume. The mediæval English law adopted, in all their entirety, the lofty ethical teachings of Christianity as to the mutual relations of the sexes. Those teachings are, for example, strictly followed by the common law in its doctrine of contract, when deciding what agreements shall be regarded as too immoral for the courts to enforce[1].

And the same teachings were enforced by punitive sanctions in the ecclesiastical courts; a jurisdiction which, though long obsolete in practice, has never been formally abolished[2]. But the common law had no penal prohibitions of similar comprehensiveness; its criminal rules taking cognisance only of those grosser breaches of sexual morality that were rendered peculiarly odious, either by the abnormality of the form they took[3], or by the violence with which they were accompanied; aggravations to which the legislature subsequently added that of the tender age of the female concerned in them[4]. Hence, the voluntary illicit intercourse of the

[1] Anson on Contracts, Part II. ch. 5, s. 1, *e* (8th ed. p. 248); Pollock on Contracts, ch. 6 (B).

[2] Stephen, *Dig. Cr. Law*, Art. 170; *Hist. Cr. Law*, II. 396—429. See the authorities cited *arguendo* in *Phillimore* v. *Machon*, L. R. 1 P. D. 481.

[3] Stephen, *Dig. Cr. Law*, ch. XVIII.

[4] *Ibid.* ch. XXIX.

sexes, even though it might take the form of mercenary prostitution or of an adulterous violation of marital legal rights, furnished no ground for a criminal indictment. Such a limitation of the sphere of penal law, like the modern abandonment of the ecclesiastical courts' penalties, is abundantly justified by the considerations, which have been already set out[1], that distinguish those injurious acts that can prudently be repressed by criminal sanctions, from such as will more fitly be left to be restrained by the penalties of social opinion and of religion.

From this class of offences against the person we may pass to those that are unconnected with sexual relations. These call for a detailed consideration. They fall readily into two groups: according as the crime does or does not leave behind it, upon the sufferer's body, some actual hurt. The former alternative, as the graver, must first be considered.

A. *Offences where actual bodily injury is occasioned*[2].

The present law regarding this aggravated class of crimes is entirely the creation of statutes. Wounding and maiming did, in early times, entitle the sufferer to bring an 'appeal' of felony[3]; and if the appeal were successful the wrong-doer forfeited life and member. But these appeals seldom proved successful; as they were usually quashed for some technical informality; and if the appellee were then arraigned at the King's suit he received no heavier punishment than that of a mere misdemeanor—imprisonment or fine. Appeals for wounding consequently died out; though the injured parties, if unwilling to indict the offender for a mere assault, had still the alternative of a civil remedy in the shape of an action of trespass[4] to recover pecuniary damages. But

[1] *Supra*, p. 28.
[2] See Stephen, *Hist. Cr. Law*, III. 108—120; *Dig. Cr. Law*, Arts. 257—268.
[3] *Supra*, p. 18.
[4] Pollock and Maitland, II. 487.

subsequently, by various statutes commencing with the Coventry Act, 22 and 23 Ch. II. c. 1[1], offences of this class have again been exposed to a more adequate punishment. The present law on the subject is, however, as Mr Justice Wright has said, "singularly fragmentary and unsystematic[2]." It is mainly to be found in the Act of 1861 consolidating the enactments that dealt with offences against the person (24 and 25 Vict. c. 100). By this Act the graver offences are made felonies, the others ranking as misdemeanors. We may mention some salient instances of each class.

1. *Felonies.*

(*a*) It is a felony, punishable with penal servitude for life, unlawfully and maliciously to wound or cause any grievous bodily harm to anyone—or shoot (or even attempt to shoot) at him—with intent to maim, disfigure, disable, or do any other grievous bodily harm, or prevent an arrest[3].

Some of the phrases here used are so technical as to need explanation. Thus, to constitute a "wound" the continuity of the skin must be broken[4]; *i.e.*, that of both skins, *cutis vera* as well as epidermis. Hence a mere scratch, though bleeding, is not a wound[5]; nor will it even suffice that bones have been fractured if the skin is not broken also[6]. Under the older statutes it was necessary that the wound should have been inflicted by some "instrument"; but under the present Act the wound may be inflicted by any means whatsoever.

Bodily harm becomes "grievous" whenever it seriously interferes with health or even with comfort. It is not necessary that its effects should be dangerous, nor that they

[1] See Stephen, *Hist. Cr. Law*, III. 112.
[2] *Draft Criminal Code for Jamaica*, p. 106.
[3] 24 and 25 Vict. c. 100, s. 18.
[4] *Rex* v. *Wood*, 1 Moody 278; *Reg.* v. *Smith*, 8 C. and P. 173.
[5] *Rex* v. *Beckett*, 1 Moody and R. 526.
[6] *Rex* v. *Wood*, 1 Moody 278.

should be permanent[1]. The rather vague question as to whether, in any particular case, the harm done was serious enough to be classed as grievous, is for the jury to determine[2].

The statutory "attempt" to shoot at a person is not made until some really proximate step is taken; as, for instance, that of drawing the trigger. Hence merely to point a loaded pistol at a man (though it does amount to an "assault" on him) will not suffice for the crime we are now considering. But to pull the trigger, even though the discharge fails through a defect in the cartridge, (or barely to put your finger on the trigger with the intention of pulling it, even though you be interrupted before you actually pull it), will suffice to constitute an attempt to shoot, within the statute[3].

To "maim" is to do such a hurt to any part of a man's body that he is rendered less capable, in fighting, either of defending himself or of annoying his adversary[4].

The wording of the statute does not make it necessary that the person whom it was intended to harm should be the one actually harmed.

(*b*) It is a felony, punishable with penal servitude for ten years, unlawfully and maliciously to administer any poison or other noxious thing to anyone so as thereby to endanger his life or inflict upon him grievous bodily harm[5].

2. *Misdemeanors.*

Each of the following statutory misdemeanors is punishable with five years' penal servitude.

(*a*) Unlawfully and maliciously wounding, or inflicting any grievous bodily harm upon, any person[6].

[1] *Reg.* v. *Ashman*, 1 F. and F. 88.

[2] *Per* Bushe, C. J., in *Reg.* v. *Phillips*, 1 Crawford and Dix 164.

[3] *Reg.* v. *Duckworth*, L. R. [1892] 2 Q. B. 83, overruling on this point *Reg.* v. *St George*, 9 C. and P. 483.

[4] 1 Hawk. P.C. c. 55, s. 1.

[5] 24 and 25 Vict. c. 100, s. 23.

[6] 24 and 25 Vict. c. 100, s. 20.

This offence differs from the somewhat similar felony above referred to as "1 (*a*)," in that the felony requires an actual intention to do the particular kind of grievous bodily harm, whereas in the misdemeanor it is sufficient that such harm has been done "maliciously," even though there was no intention to produce the full degree of harm that has actually been inflicted. Here we again meet with "that most unsatisfactory of all expressions[1]"—*malice*. But the "malice" required here is something narrower than that vague general idea of a wicked state of mind which the word usually denotes at common law[2], as in cases of homicide or in the phrase "mute of malice[3]." For in *statutory* wrongs the word "malice" is presumed to have been employed by the legislature in a precise sense; so as to require a wickedness which consisted of, or included, an actual intention to do an injury, and, moreover, an injury of the same kind as that which in fact was done. Thus the intention to injure a man's body is not such malice as will support an indictment for malicious injury to his property; and similarly *vice versâ*. Accordingly if a stone aimed at a person misses him, but crashes through a window, the thrower will not necessarily be guilty of "maliciously" breaking this window[4]. And, similarly, had the stone been flung at the window, and then intercepted on its flight by the head of someone who unexpectedly looked out of the window, the thrower would not necessarily have committed a "malicious" injury to this person. In either of these two cases, however, there would be a sufficient "malice," if the man who threw the stone in the desire of doing the one kind of harm, knew that it was likely that the other kind might be done, and felt reckless as to whether it were done or not, although he did not go so far as actually to desire it.

[1] Prof. E. C. Clark, *Analysis of Criminal Liability*, p. 82. "One of the most perplexing legal terms;...continually used in conflicting senses"; (Bigelow on Torts, § 35).

[2] Cf. 2 Ld. Raymond 1485.

[3] *Infra*, Book IV.

[4] *Reg.* v. *Pembliton*, L. R. 2 C. C. R. 119 (K. S. C. 157).

But if the harm done be of the *kind* intended, this is sufficient; even though it be produced in some degree, or in some manner, or upon some subject, that was not intended. Thus where a soldier aimed a blow at another man with his belt, but the belt bounded off and struck a woman who was standing by, and cut open her face, he was held guilty of maliciously wounding her[1].

Much confusion hangs around the three cognate words—Malice, Intention, Purpose. Clearly 'purpose' always involves the idea of a desire. So, also, in popular parlance does 'intention'; for a man is not ordinarily said to 'intend' any consequences of his act which he does not desire but regrets to have to run the risk of[2], (*e.g.* when he shoots at an enemy, though seeing that a friend is close to the line of fire). Yet in law it is clear that the word 'intention,' like the word 'malice,' covers all consequences whatever which the doer of an act foresees as likely to result from it; whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not[3]. The fact that he had means of knowing a consequence to be likely, raises a *primâ facie* presumption that he did actually foresee it as being so. There is such a great difficulty in obtaining any evidence to rebut this presumption, as to render it practically equivalent to a conclusive one. Hence it is sometimes spoken of as if it strictly were conclusive[4].

Accordingly, to give legal proof of malice is less difficult than might theoretically have been expected. If the act was unlawful, and done with a bad motive, and was at all likely to cause injury of the kind that did in fact result, there is enough *primâ facie* proof of 'malice' to warrant

[1] *Reg.* v. *Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).

[2] Prof. E. C. Clark's *Analysis of Criminal Liability*, pp. 73, 78; Markby's *Elements of Law*, s. 222. And see above, p. 134.

[3] *Reg.* v. *Welch*, L. R. 1 Q. B. D. 23. Cf. Mr Justice Wright's *Draft Criminal Code for Jamaica*, pp. 3, 98; Austin, Lecture xxi.

[4] *E.g.* 11 Irish C. L. R. 21. As to "Knowledge," see p. 253 *infra*.

a conviction. Thus, where A was engaged in shooting wild-fowl, and B fired a gun in the direction of A's boat with the mere object of frightening A so as to make him give up his sport, but, owing to the boat's being suddenly slewed round, the shot actually struck A, it was held that there was sufficient evidence of malice on the part of B[1]. And where A, merely in order to frighten B, pointed at him a gun which he knew to be loaded, and then, in consequence of B's own act in seizing the muzzle, the gun accidentally went off and shot B, it was held by Wills, J.[2], that there was a sufficiently "malicious" wounding; (and accordingly that the prisoner might be convicted of this minor offence, though acquitted of the felonious one[3] of wounding "with intent to do grievous bodily harm").

Unlawfully inflicting grievous bodily harm *without* (strict statutory) "malice," is not known to the law as a specific offence; and can at most be dealt with as a mere form of assault. If it were inflicted by mere *negligence*, however gross, it probably is not even an assault[4]; and thus is no offence at all, unless death results from it[5]. The quack, who makes his patient lose a limb or an eye, is only liable civilly and not criminally.

The question as to what kind of causation will suffice to constitute an "inflicting" shall be considered later on[6].

(*b*) Occasioning actual bodily harm by an assault[7].

The reason of the framers of the Act of 1861 for separating this offence from that last described (viz., '2 (*a*)') is not obvious; especially as they both entail the same punishment. Indeed, "occasioning actual bodily harm by an assault" would seem a description wide enough to include

[1] *Reg.* v. *Ward*, L. R. 1 C. C. R. 356.

[2] Cambridge Assizes, Oct. 1899. Cf. *Commonwealth* v. *Mink*, 9 Lathrop 422 (K. S. C. 110).

[3] *Supra*, p. 145.

[4] *Infra*, p. 158. *Reg.* v. *Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).

[5] *Supra*, pp. 119—124. Cf. *Reg.* v. *Ward*, L. R. 1 C. C. R. 356.

[6] *Infra*, p. 150.

[7] 24 and 25 Vict. c. 100, s. 47.

all the acts covered by 2 (*a*); unless "inflict" be taken to have been used by the legislature as a wider word than "assault," and as capable of including the production of harm by some indirect and protracted chain of causation, *e.g.*, by poisoning or infecting with disease. Arguments of great force have been used in favour of this wide construction[1]. And we may add to them that in *Reg.* v. *Halliday*[2] the Court for Crown Cases Reserved held that grievous bodily harm had been "inflicted," where the defendant had merely frightened a woman so that she jumped from a window and was hurt; and this frightening, though an "assault" in the old technical meaning of that word was no assault in the modern sense of a "battery." But in *Reg.* v. *Clarence*[3], when the majority of the Court held that the communication of venereal disease by a husband (even though he knew of it) to his wife (even though she did not know of it) was no assault, inasmuch as there was consent to the contact, they decided that it consequently was not an "*inflicting* of grievous bodily harm"; on the ground that they considered that an "inflicting" must be by assault and battery[4] and requires a direct and immediate causing of the harm.

(*c*) Unlawfully and maliciously administering to anyone any poison or other noxious thing with intent to injure, aggrieve, or annoy him[5].

If the thing administered be a recognised "poison," it seems probable that the offence would be committed by giving even a quantity so small as to be incapable of doing harm[6]. But if it be not a poison, and be "noxious" only when taken in large quantities, (as, for example, castor-oil or

[1] See *per* Hawkins, J., in *Reg.* v. *Clarence*, L. R. 22 Q. B. D. at p. 49.

[2] 61 *Law Times*, 699. See similarly *Reg.* v. *Martin*, L. R. 8 Q. B. D. 54.

[3] L. R. 22 Q. B. D. 23.

[4] Wills, J., at p. 37; Stephen, J., at p. 41; Pollock, B., at p. 62.

[5] 24 and 25 Vict. c. 100, s. 24.

[6] See *per* Field, J., and Stephen, J., in *Reg.* v. *Cramp*, L. R. 5 Q. B. D. 307; a case arising upon similar words in a different statute.

ardent spirits), the offence will not be committed by giving a person only a small dose of it[1].

Upon an indictment for *feloniously* administering poison (under 24 and 25 Vict. c. 100, s. 23[2]), the jury are permitted to convict, instead, of this misdemeanor of administering it in a less heinous manner[3].

B. *Offences in which actual bodily harm is not essential.*

An "assault" is an unlawful attempt, or offer, with violence, to do a corporal hurt to another[4]. A "battery" is an injury done to the person of a man in an angry, revengeful, rude or insolent manner[5]. In other words, an assault is a movement which attempts, or threatens, the unlawful application of force to another person; whilst such an application itself, when actually effected, constitutes a battery. Thus riding *at* a person is an assault[6], riding *against* him is a battery. A mere assault, even without any battery, is not only a tort but also a misdemeanor. Hence if a battery ensue, it does not enhance the degree of the crime; though it is important as affording clear proof of the hostile intention of the movements which constitute the assault. Usually, of course, both the two offences are committed together; and the whole transaction is legally described as "an assault and battery." This became shortened in popular language to "an assault"; and now the current speech even of lawyers habitually uses that word as if synonymous with "battery."

Even in a battery, no actual harm need be done or threatened. The slightest force will suffice, if it were exercised in a hostile spirit; thus merely spitting at a person may amount to an indictable battery. The force applied (or threatened) need not involve immediate contact between the assailant and the sufferer. Thus it is sufficient

[1] *Reg.* v. *Hennah*, 13 Cox 547. [2] *Supra*, p. 146.

[3] 24 and 25 Vict. c. 100, s. 25.

[4] Hawkins, P. C. c. 62, s. 1. An assault committed in a *public* place becomes an "Affray."

[5] *Ibid.* s. 2. Cf. Pollock on Torts, Bk. II. chap. 6.

if harm is done (or threatened) to a person's clothes without touching his skin[1]. And, similarly, the hostile force may be exercised either directly or even indirectly, as by striking a horse and thereby making it throw its rider[2].

To deprive another person of his liberty will usually involve either touching or threatening to touch him; and thus the tort of false imprisonment usually involves the crime of an assault[3]. But some bodily *movement* is essential to an assault or battery; so that where there is only mere motionless obstruction[4]—as where a cyclist is brought down by collision with a person who only stands still, however wilfully, in front of him—no proceedings can be taken for assault. (The much graver offence of "maliciously causing grievous bodily harm," may, however, have been committed.) Similarly, mere words, however threatening, can never make an assault[5]. Yet they may *un*make an assault; as in a case where a man laid his hand menacingly on his sword, but at the same time said, "*If it were not assize time*, I'd run you through the body[6]."

Alarm is essential to an assault. Hence if a person who strikes at another is so far off that he cannot by possibility touch him, it is certainly no assault[7]. And it has even been said that to constitute an assault there must, in all cases, be the means of carrying the threat into effect[8]. Accordingly, whilst pointing a loaded pistol at a person is undoubtedly an assault, it was held, in *Reg.* v. *James*[9], that it was no assault to present an unloaded one. But in an earlier case, *Reg.* v. *St George*[10], it was held, on the contrary, that if a person

[1] *Per* Parke, B., in *Reg.* v. *Day*, 1 Cox 207.
[2] Cf. *Dodwell* v. *Burford*, 1 Mod. 24.
[3] 1 Hawk. P. C. c. 60, s. 7; 4 Bl. Comm. 218.
[4] *Innes* v. *Wylie*, 1 C. and K. 257.
[5] 1 Hawk. P. C. c. 62, s. 1.
[6] *Tuberville* v. *Savage*, 1 Mod. 3.
[7] Com. Dig. *Battery* (C).
[8] *Per* Tindal, C. J., in *Stephens* v. *Myers* (1830), 4 C. and P. 349.
[9] (1844), 1 C. and K. 530.
[10] (1840), 9 C. and P. 483.

presents a firearm which he knows to be unloaded, at a man who does not know that it is unloaded, and who is so near that (were it loaded) its discharge might injure him, an assault is committed.

This latter view, which makes the offence depend upon the alarm naturally (however mistakenly) aroused in the person threatened, is in accord with the Scotch law[1]; and it agrees with the predominance of authority in America, where this question has much more frequently come before the courts than in this country[2].

It may be regarded as now settled that poisoning, where the poison (as is usually the case) is taken by the sufferer's own hand, does not constitute an assault[3]. A contrary view was at one time taken in this country, and is still favoured in America[4]. But, on principle, it is essential to an assault that there should be a personal exertion of force by the assailant. If therefore the actual taking up of the cup or glass was the act of the person poisoned, there is no assault; even though he took it in consequence of the poisoner's false representation that it was harmless. This consideration seems to settle the controversy; irrespectively of the further arguments that poison, unlike an ordinary "battery," takes effect internally instead of externally, and acts chemically instead of mechanically. Hence, as we have seen[5], the statute 24 and 25 Vict. c. 100 distinguishes between the offence of causing bodily harm by an assault[6], and that of administering poison with intent to injure or annoy[7].

[1] *Walter Morison's Case* (1842), 1 Broun 394.

[2] Bishop, *Criminal Law of U.S.A.* II. § 32. See, for the liability, *Commonwealth* v. *White*, 100 Mass. 407; and, against it, *State* v. *McKay*, 44 Texas 43.

[3] *Reg.* v. *Dilworth*, 2 Moo. and R. 531; *Reg.* v. *Walkden*, 1 Cox 282; *Reg.* v. *Hanson*, 2 C. and K. 912; and see *per* Hawkins, J., in *Reg.* v. *Clarence*, L. R. 22 Q. B. D., at p. 42.

[4] *Commonwealth* v. *Stratton*, 114 Mass. 303.

[5] *Supra*, pp. 149—150.

[6] sec. 47.

[7] sec. 24.

The exercise of force against the body of another man is not always unlawful[1]. The principal occasions on which (provided that the amount used is not more than is proportionate to the immediate need) it is legally justifiable are the following:

(1) In the furtherance of public authority; as in preventing a breach of the peace, or arresting a felon, or executing any process issued by a court of law. This has been already sufficiently considered in discussing the subject of Homicide[2].

(2) In correcting either your own children, or the scholars or apprentices who have been placed under your authority. The limits of this right have also already been considered[3].

(3) In defending either (*a*) your person, or (*b*) your existing lawful possession of any property (whether it consist of lands or merely of goods).

"Nature prompts a man who is struck to resist; and he is justified in using such a degree of force as will prevent a repetition[4]." Nor is it necessary that he should wait to be actually struck, before striking in self-defence. If one party raise up a threatening hand, then the other may strike[5]. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master[6]; (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak[7]). A familiar modern instance is the force exercised by the stewards of a public meeting, to remove those who persistently disturb it.

[1] Cf. *supra*, pp. 102—111. [2] *Supra*, p. 103. [3] *Supra*, p. 109.

[4] *Per* Parke, B., 2 Lewin 48. [5] *Ibid.*

[6] 1 Hawk. c. 80, ss. 23, 24; *Reg.* v. *Rose*, 15 Cox 540 (K. S. C. 140).

[7] Bishop, *Criminal Law of U.S.A.*, 8th ed. I. § 877. 3. Cf. 11 Mod. 242.

But the justification extends only to blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery[1]. The numerous decisions that have been given as to the kind of weapons that may lawfully be used, to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen[2], where a person is attacked with such extreme violence that his very life is in danger he is justified in even killing his assailant. But a mere ordinary assault must not be thus met by the use of firearms or other deadly weapons[3]. And, similarly, a knife is not usually a proper instrument of self-defence, but must only be employed where serious bodily danger is apprehended, or where a robbery (*i.e.*, a theft by violence) is to be prevented[4]. Hence it is unjustifiable for a man to use it where the attack upon him is made with a mere strap. It should, however, be noted that where more force than was necessary has been used for self-defence, the case is not to be treated as if all the force employed had been illegal. The fact that part of it was justifiably exerted may, for instance, have the effect of reducing a charge of "wounding with intent to do grievous bodily harm" to one of mere unlawful wounding[5].

The right of self-defence extends, as we have said, to the defence not only of your person but also of your property. Thus force may lawfully be used in expelling anyone who is trespassing in your house, or on your land, if no milder mode of getting rid of him would avail. Hence if his entry had itself been effected forcibly, as by a burglary or even by breaking open a gate, you may at once use force to expel

[1] *Reg.* v. *Driscoll*, C. and M. 214 (K. S. C. 151).
[2] *Supra*, p. 103.
[3] *Osborn* v. *Veitch*, 1 F. and F. 317 (K. S. C. 150).
[4] *Reg.* v. *Hewlett*, 1 F. and F. 91 (K. S. C. 150).
[5] *Reg.* v. *Hunkey*, 3 C. and K. 142.

him[1]. But in the case of an ordinary peaceful trespasser, it will not be until you have first requested him to depart, and he has failed to comply with the request, that you will be justified in ejecting him by the strong hand. Disturbance of an easement is a wrong in the nature of a trespass, and therefore force may be used to prevent it[2].

A similar right exists in the case of movable property. Force may accordingly be used to resist anyone who attempts to take away your goods from you[3]. And there is modern authority for saying that force may even be used to *recapture* your goods, after they have been actually taken out of your possession. But this alleged right to use force, not merely to protect an existing possession but to create one, is not beyond doubt[4]. In the case of real property it certainly does not exist. A landlord may commit an indictable offence by "forcibly entering" a house, although it is his own, if any full (though unlawful) possessor is excluding him[5]. For real property, unlike personal, is in no danger of being meanwhile destroyed, or lost, if the owner waits for the intervention of the law to recover it.

(4) There is, again, a legal justification for the trifling degree of force involved in those petty instances of contact which inevitably arise in the ordinary social intercourse of everyday life[6]; such as tapping a friend's shoulder to attract his attention, or jostling past one's neighbour in a crowd. But, to be thus justifiable, these acts must be done *bonâ fide*, and with no unusual vehemence.

(5) There is, further, a justification for acts that are done by consent of the person assaulted; unless the force be

[1] *Green* v. *Goddard*, 2 Salk. 641 (K. S. C. 147).
[2] *Bird* v. *Jones*, L. R. 7 Q. B. D. 742.
[3] 2 Rol. Abr. 548; *Green* v. *Goddard*, 2 Salk. 641 (K. S. C. 147).
[4] See Pollock on Torts, 6th ed. p. 372.
[5] *Newton* v. *Harland*, 1 M. and G. 744; cf. L. R. 17 Ch. D. at p. 188.
[6] *Hopper* v. *Reeve*, 7 Taunt. 698.

a breach of the peace, or be causelessly dangerous. *Volenti non fit injuria.* Hence seduction is no assault, either in the law of crime or even in that of tort[1].

But the consent must be given freely (*i.e.*, without force, fear or fraud), and by a sane and sober person, so situated as to be able to form a reasonable opinion upon the matter to which consent is given[2]. For "fraud vitiates consent"; and accordingly an impostor who, by pretending to be a surgeon, induces an invalid to submit to be operated upon by him, will be guilty of assault, notwithstanding the consent which was nominally given. As regards the mental capacity to consent, it may be mentioned that, in the case of indecent assaults, the legislature has established a definite rule as to age, by enacting that consent given by a child of either sex under thirteen years of age shall not constitute a defence[3]. And, again, even the most complete consent, by the most competent person, will not suffice to legalise an assault which there are public grounds for prohibiting. Thus consent is no defence, criminally[4], for any assault that amounts to a breach of the peace. The public interests similarly preclude the consent of the person injured from affording any defence where the violence exercised (and consented to) involved some extreme and causeless injury to life, limb, or health. If, therefore, one of the parties to a duel is injured, his consent is no excuse[5]. Yet it is uncertain at what degree of danger the law thus takes away a man's right to consent to be placed in situations of peril, (as for instance, by allowing himself to be wheeled in a barrow along a tight-rope[6]). But in the case of a surgical operation

[1] Pollock on Torts, 6th ed. p. 226.

[2] Stephen, *Dig. Cr. Law*, Art. 224.

[3] 43 and 44 Vict. c. 45, s. 2.

[4] *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534. *Vide supra*, p. 110. For the (disputed) effect of such consent upon the *civil* liability, see Pollock on Torts, ch. IV. s. 11; Kenny's *Cases on Tort*, p. 157.

[5] *Reg.* v. *Barronet*, 1 E. and B. 1.

[6] Stephen, *Dig. Cr. Law*, Art. 230.

carried out by a competent surgeon, however great be the risk, there will usually be adequate cause for running it; and so the patient's consent will be full justification for what would otherwise be an aggravated assault. And even injuries which are occasioned in the course of a mere game, if it be a lawful one and be played with due care, are not regarded as causeless[1].

These rules as to the amount of violence which constitutes an assault, and as to the circumstances which will excuse that violence, hold equally good in the law of tort and in the law of crime. But it is not quite certain whether those two branches of law are similarly identical in their rules as to the state of mind which will render a man liable for the exercise of such violence as has been shewn to be a forbidden act. In actions of tort, either intention or even mere negligence[2]—if the degree of negligence be gross—will suffice to render the wrong-doer liable to pay damages. But great doubt is entertained as to whether any assault can render a man liable to criminal punishment unless it were committed with actual intention. The reported cases, however, go no further than to shew that no indictment will lie where there is not even negligence[3].

The following assaults are statutory misdemeanors, punishable with the statutory penalty of imprisonment with hard labour for two years, viz.:—

1. Assaults with intent to commit a felony[4].

2. Assaults with intent to prevent the lawful apprehension either of the assailant himself or of any other person[5].

[1] *Supra*, p. 110.

[2] *Weaver* v. *Ward*, Hobart 184; yet see Bigelow on Torts, 7th ed. § 374.

[3] *Rex* v. *Gill*, 1 Strange 190. Both in the United States (Wharton's *Criminal Law*, Bk. IV. ch. 8), and in Scotland (Macdonald's *Criminal Law*, p. 154), it is clear that negligence is not sufficient to make an assault criminal.

[4] 24 and 25 Vict. c. 100, s. 38.

[5] *Ibid.*

3. Assaults upon a constable in the execution of his duty, or upon any person acting in aid of such constable[1].

Even a mere common assault is also an indictable misdemeanor, punishable on indictment (*i.e.*, on trial before a jury) by imprisonment for one year with hard labour, or by a fine[2].

The person assaulted has usually also the option of prosecuting the offender summarily before a court of petty sessions. For though an assault must be dealt with by indictment if it either (i) involves the title to lands[3], or (ii) is accompanied by an attempt to commit a felony[4], yet in all other cases of assault the offender may be summarily convicted, without a jury, before two justices of the peace[5]. But the maximum penalties that such a court can inflict are only:—

(*a*) Nine months' imprisonment with hard labour; for assaulting a constable in the execution of his duty, after having been previously convicted of a similar assault within two years[6].

(*b*) Six months' imprisonment with hard labour, or a fine of £20; for

i. Assaulting a constable in the execution of his duty[7].

ii. Assaulting a boy under fourteen, or any female; provided that the assault is of an aggravated nature[8].

(*c*) Two months' imprisonment with hard labour, or a fine of £5; for a common assault. The justices in this instance can summarily convict only when the complaint has

[1] 24 and 25 Vict. c. 100, s. 38.
[2] 24 and 25 Vict. c. 100, s. 47.
[3] 24 and 25 Vict. c. 100, s. 46.
[4] *Ibid.*
[5] 24 and 25 Vict. c. 100, s. 42.
[6] 34 and 35 Vict. c. 112, s. 12.
[7] *Ibid.*
[8] 24 and 25 Vict. c. 100, s. 43.

been made by (or on behalf of[1]) the very person assaulted; and not merely by the police[2]. For a resort to this summary procedure takes away the aggrieved party's right of civil action. In Ireland, however, (as, there, injured persons are less ready to prosecute), the justices may, by 25 and 26 Vict. c. 50, s. 9, try cases of assault even when the party assaulted declines to complain.

By 41 Vict. c. 19, any court which convicts a husband (either summarily or not) of an aggravated assault on his wife may, if satisfied that her future safety is in peril, make an order that she shall no longer be bound to cohabit with him; and may also make an order for her maintenance. The first-mentioned order will have the effect of a judicial separation. The word "aggravated," in this enactment, is not limited to the various statutory aggravations of assaults.

[1] To meet the case of children being assaulted.

[2] 24 and 25 Vict. c. 100, s. 42.

CHAPTER XI.

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY.

PASSING from crimes against the Person to crimes against Property, our discussion of the various offences which violate rights of ownership ought to begin with those groups which centre round two ancient crimes of peculiar heinousness—Arson and Burglary—whose historical importance can be traced to the peculiar sacredness which early English law attached to men's habitations[1]. For a dwelling-house was regarded as being its occupier's "castle and fortress, as well for his defence against injury and violence, as for his repose. *Domus sua cuique est tutissimum refugium*[2]." Hence to set fire wilfully to the humblest cottage is still a heinous felony; though to set fire equally wilfully to some unique picture or some priceless tapestry is at most a misdemeanor, and at common law was no crime at all.

This felony of Arson (so called from the Latin *ardeo*, I burn) was at one time punished with the terrible retaliation of death by burning[3]. Yet to destroy a house in any other manner than by fire was not regarded by the common law as a criminal offence at all. The legislature has, however, now supplied this omission by making it a felony *riotously* to demolish a house[4] and a misdemeanor *riotously* to damage[5] one; and more generally, apart from any riot, by rendering the doing of malicious injury to any property—whether a house or not—a crime. That crime is punishable in some cases as

[1] 4 Bl. Comm. 223. [2] *Semayne's Case* [A.D. 1604], 5 Coke 91.
[3] Britton, I. 41. [4] 24 and 25 Vict. c. 97, s. 11. [5] *Ibid.* s. 12.

an indictable misdemeanor[1] and in others as a mere petty offence[2], according to the amount of damage done.

Arson at common law was defined as "the malicious and wilful burning of the house or outhouse of another man[3]." The requirement of malice suggests the remark that arson seems to have been one of the earliest crimes in which the mental element was emphasised. "At a very early time, men must distinguish between fires that are, and fires that are not, intended[4]." So far back as the days of Bracton[5] it was already settled that "Incendia fortuita, vel per negligentiam facta, et non malâ conscientiâ, capitali sententiâ non puniuntur; quia civiliter agitur contra tales."

The phrase "burning" was construed narrowly, and was regarded as requiring that some portion of the building must be actually consumed by the fire; anything short of this being held to be a mere attempt at arson. In limiting the crime to the burning of the house of "another man," attention was concentrated on the interference with the rights, not of the owner, but of the immediate occupier. Hence, if a tenant were actually in lawful possession of a house, even though his tenancy was to last no longer than for the single day, he would commit no arson by burning the house down. And, on the other hand, his landlord (though the owner of the house) would commit arson if he burned it whilst it was still in the occupation of the tenant.

But the common law definition no longer holds good. It has been superseded by the somewhat different language adopted in various statutes dealing with arson, which are now consolidated by the Malicious Injuries to Property Act, 1861[6].

Arson under this enactment is now the felony of unlawfully and maliciously setting fire to buildings or to certain

[1] 24 and 25 Vict. c. 97, s. 51. [2] *Ibid.* s. 52. [3] 4 Bl. Comm. 220.
[4] Pollock and Maitland, II. 491. [5] fo. 146 b.
[6] 24 and 25 Vict. c. 97. See Stephen, *Dig. Cr. Law*, Arts. 417—421.

peculiarly inflammable kinds of other property. The possible punishments vary. In one extremely rare class of cases arson is punishable with death, under statutes which are still unrepealed; viz., when it consists in setting fire to a King's ship or dockyard[1], or to any ship in the port of London[2].

The next most heinous class of cases are those in which penal servitude for life may be inflicted; viz., the offences of setting fire to:—(1) a church[3], railway station[4], public building[5], stack[6], coal mine[7], or ship[8]; (2) a dwelling-house when any person is therein[9]; and (3) almost any kind of building if the act be done with intent of injuring or defrauding any person[10]. But for setting fire to any building under any other circumstances than those above mentioned[11], or for setting fire to crops or plantations[12], the maximum penalty is only penal servitude for fourteen years.

It will be seen that the statutory law of arson is far wider than was the common law doctrine of it. The crime is no longer confined to houses and outhouses; and moreover it may be committed even by a person who is in possession of the thing burned.

Two of the statutory phrases call for comment—the "maliciously" and the "setting fire to."

(*a*) "*Maliciously.*" Burning a house by any mere negligence, however gross it be, is, as we have seen[13], no crime; (an omission in our law which may well be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of an unlawful act, or even of a felonious one,

[1] 12 Geo. III. c. 24, s. 1 (Dockyards Protection Act); 7 and 8 Geo. IV. c. 28, ss. 6, 7.

[2] 39 Geo. III. c. 69, s. 104.
[3] 24 and 25 Vict. c. 97, s. 1.
[4] *Ibid.* s. 4.
[5] s. 5.
[6] s. 16.
[7] s. 26.
[8] s. 42.
[9] s. 2.
[10] s. 3.
[11] s. 6.
[12] s. 16.

[13] *Supra*, p. 162; 3 Coke *Inst.* 67.

will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, "malice" must, as we have already seen[1], be taken—not in its vague common law sense as a "wickedness" in general, but—as requiring an actual intention to do the particular kind of harm that in fact was done. Consequently, if a criminal, when engaged in committing some burglary or other felony, negligently sets fire to a house, he usually will not be guilty of arson[2]. He would, however, be so in those rarer cases where the original crime he was engaged in was itself an act of burning, such as he would know to be likely to result in producing an arson. For a man is responsible for all the foreseen consequences of his acts. Thus under the old common law, if a man by wilfully burning his own house, (which would not be arson), accidentally burnt the closely adjacent house of a neighbour, he might be guilty of arson; since in such a case the law would raise a *primâ facie* presumption of malice from the manifest obviousness of the danger[3]. But it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, will necessarily become guilty of arson if the fire should happen to spread to an arsonable building. For if a man mischievously tries to burn some chattels inside a house, and, quite accidentally and unintentionally, sets fire to the house thereby, this is not an arson of the *house*[4]. And even if his setting fire to the chattels inside the building was intrinsically likely to result in setting fire

[1] *Supra*, p. 147; *Reg.* v. *Pembliton*, L. R. 2 C. C. R. 119 (K. S. C. 157).

[2] *Reg.* v. *Faulkner*, 11 Ir. Rep. C. L. 8 (K. S. C. 152).

[3] *Rex* v. *Probert*, 2 East P. C. 1030.

[4] Not of the house; and not even of the chattels burned, for, though s. 7 does make it a felony to set fire to "*any* matter or thing" in (or against) a building, it does so only where the incendiary knows and disregards the danger to *the building*. *Reg.* v. *Child*, L. R. 1 C. C. R. 307; *Reg.* v. *Nattrass*, 15 Cox 73 (K. S. C. 156).

to the building itself, he still will not necessarily be guilty of arson of it. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so[1].

(*b*) The statute speaks of "setting fire to" houses, where the common law required a "burning." But this appears to be a distinction without a difference; since "set fire to" is regarded as meaning not merely "place fire against," but actually "set on fire." It will be sufficient if any part of the woodwork of the building has been charred, by being raised to a red heat even without any blaze[2], for some kinds of wood will burn away completely without ever blazing at all[3]. But it has been held not to be sufficient that the action of the fire has scorched some of the wood to blackness, if no part of it has been actually "consumed[4]." Yet it does not seem easy to draw any true distinction between these two cases; inasmuch as even a mere blackening of wood shews that the chemical constitution of its cell-walls has, as in the case of charcoal, undergone a change. There must consequently have been a "decomposition" (which is the test suggested by Sir James Stephen[5]), with a consequent actual loss in weight; and therefore, in fact, a "consumption" of part of the wood, though this appears to have been denied in *Reg.* v. *Russell.*

[1] *Reg.* v. *Harris*, 15 Cox 75 (K. S. C. 154). Cf. C. C. C. Sess. Pap. cxxvii. 15. Similarly where a prisoner, indicted (under 24 and 25 Vict. c. 100, s. 32) for maliciously obstructing a railway line with intent to endanger the safety of persons travelling thereon, was found by the jury to be "guilty of the act, but with an intent, not of causing injury, but only of gaining favour with his employers by professing to discover the obstruction," this was held by Grantham, J., to amount to a verdict of Not guilty. (*The Times*, 29 July, 1901.)

[2] *Reg.* v. *Parker*, 9 C. and P. 45.

[3] *Reg.* v. *Russell*, C. and M. 541.

[4] *Reg.* v. *Russell.*

[5] *Dig. Cr. Law*, Art. 119 n.

Arson was the only form of injury to property that was recognised by the common law as a crime[1]. All other kinds of mischievous damage to it were merely trespasses, to which only a civil remedy was attached. But by statutory legislation, numerous provisions have been made for the criminal punishment of various forms[2] of malicious injury to property. These are now consolidated, with additions, in the Malicious Damage Act, 1861 (24 and 25 Vict. c. 97).

Under this statute malicious injuries to various specified classes of property are rendered criminal offences of various degrees of guilt, ranging from that of felonies punishable with penal servitude for life (*e.g.*, for destroying machinery used in textile manufactures, or textile goods exposed in process of manufacture[3]), down to mere petty offences punishable on summary conviction.

Malicious injuries to all other real or personal property, not included in these specified classes, are dealt with as follows:—

(1) Causing damage to an amount exceeding £5, is an indictable misdemeanor; and (*a*) when committed by night (*i.e.*, between 9 p.m. and 6 a.m.) is punishable with penal servitude for five years[4], or imprisonment for two years, with or without hard labour, or a fine[5]; or (*b*) when committed by day, is punishable with such imprisonment, or a fine.

(2) Causing damage to the amount of only £5 or under, is a petty offence, punishable on summary conviction by imprisonment for two months, with or without hard labour, or by a fine not exceeding £5, together with compensation (not exceeding £5) to the party aggrieved[6].

These provisions do not extend to mischief done either

[1] Stephen, *Hist. Cr. Law*, III. 188.
[2] See Stephen, *Dig. Cr. Law*, Arts. 417—425.
[3] 24 and 25 Vict. c. 97, s. 14.
[4] *Ibid.* s. 51. [5] *Ibid.* s. 73. [6] *Ibid.* s. 52.

(*a*) under a reasonable supposition of right[1], or (*b*) without any intent to injure and without in fact producing more than a merely nominal injury. But if the injury, though slight, is quite appreciable, the statute applies. Thus in *Hamilton* v. *Bone*[2] a conviction was sustained for cutting blossom from a neighbour's chestnut tree, though the blossom was only worth elevenpence. Whereas trespassers who, without any malice or wilfulness in their act, played football on grass land in the winter-time, when no appreciable injury could be caused by it to the grass, were held to have committed no criminal offence[3]. Hence the familiar announcement "Trespassers will be prosecuted" is often a prophecy utterly incapable of fulfilment[4]. But where the land to which it refers is bearing such a crop (*e.g.*, mowing grass) as is capable of receiving appreciable damage from the trespass, the presence of a prohibitory notice may be important as shewing the "wilfulness"—and therefore the criminality—of a trespass committed in defiance of it[5].

Moreover it must be remembered that to damage property is one thing, and to carry it off is another. Hence in *Gardner* v. *Mansbridge*[6], a conviction under this statute for plucking wild mushrooms (though to a value of as much as two shillings) was quashed; and partly upon this very ground, viz., that the Act does not regard the loss to the owner, but the damage to the realty. And here the realty itself was no worse, for sections 16—24 shew that the statute treats the fruits of realty not as being a part of the realty, but as distinct from it. (In our case of plucking blossom from a tree[7], part (and a cultivated part) of the freehold, stood visibly mutilated.) A further ground was that, as s. 24

[1] *Reg.* v. *Mussett*, 36 J. P. 280. Cf. L. R. [1903] 2 K. B. 714.

[2] 16 Cox 437.

[3] *Eley* v. *Lytle*, 50 J. P. 308.

[4] Cf. Pollock on Torts, ch. IX. sec. 10; Maitland's *Justice and Police*, p. 13.

[5] See *Gayford* v. *Chouler*, L. R. [1898] 1 Q. B. 316.

[6] L. R. 19 Q. B. D. 217.

[7] *Hamilton* v. *Bone*, 16 Cox 437; *supra*.

inflicts only one month's imprisonment for taking cultivated plants, the mere general words of s. 52, which inflicts two months' imprisonment, must not be allowed to include *un*-cultivated plants. Hence to take, however wilfully and maliciously, such things as fern-roots, primrose-roots, water-cresses, mushrooms, sloes, hips, nuts, blackberries, when they are growing *wild*, usually constitutes no offence under this Act. Yet where, as in the case of nuts and sloes, a shrub or underwood is concerned, the plunderer will commit an offence under s. 53 if his depredations are so effected as to involve injury to the shrub itself. In all other cases his act is merely a civil wrong; for, even when looked at as a theft, it will fall neither within the common law (which punishes no thefts of realty), nor within the Larceny Act of 1861, which does not, even under ss. 36 and 37, protect uncultivated plants. Hence the prudence of those farmers who, in fields where mushrooms are plentiful, place some spawn occasionally here and there under the turf, and put up a notice that "Mushrooms are cultivated in this field."

We have already more than once said[1] that in *statutory* wrongs of malice, there must be an intention to do the particular kind of harm that actually was done. It is scarcely necessary to point out here that, as all the offences with which we are now dealing are purely statutory, this principle applies to them with full force. It is, at the same time, provided by s. 58 of the Act, that the malice need not be against the owner of the property. And indeed, it need not be against any human being at all. It is true that on the construction of a similar statute, 9 Geo. I. c. 22, which first made it a crime "maliciously to kill or wound cattle," the judges of the eighteenth century repeatedly held it to be necessary that the wound should have been inflicted from a feeling of malice against the owner of the animal; so that spite merely against the animal itself would not suffice, even

[1] *Supra*, pp. 147, 164.

where the injury to it would necessarily violate the rights of its owner[1]. But in a recent case a man, who had in a fit of drunken spite cruelly kicked and stabbed a horse which was his own, was indicted (under 24 and 25 Vict. c. 97, s. 40) for having feloniously and maliciously wounded it[2]. It was urged that he was only liable to be convicted of a petty offence under the Act for the prevention of cruelty to animals[3]. But it was held by Lord Russell, C.J. (after consultation with Grantham, J.), that he might be convicted of the felony. This extension of the idea of malice to cases of mere cruelty, in which a sentient creature is hurt but the rights of no human being are infringed, affords a striking instance of the advance which has taken place during the past century in the current ethical conception of man's duties towards the lower animals.

[1] 2 East's *Pleas of the Crown*, 1072—1074.

[2] *Reg.* v. *Parry* (Chester Assizes), *The Times*, July 27, 1900. Cf. *Reg.* v. *Welch*, L. R. 1 Q. B. D. 23.

[3] 12 and 13 Vict. c. 92, s. 2.

CHAPTER XII.

BURGLARY AND HOUSEBREAKING.

In consequence of the peculiar sanctity which, as we have seen[1], the common law attaches to even the humblest dwelling-house, capital punishment was inflicted upon those guilty of the nocturnal violation of any habitation, even when little or no injury had been done thereby to the fabric The crime of Burglary[2] is committed when a dwelling-house or a church (or, as the old books used to add, a walled town), is broken and entered at night with the intention of committing some felony therein[3]. Let us consider successively the five points in this definition; the place, the breaking, the entry, the time and the intention.

(1) *The Place.* That the walls of a town should have been protected by as stringent penalties as those which safeguarded the townsmen's own homes, will not be surprising to any one who is familiar with the Roman treatment of city-walls as *res sanctae*[4], or who has learned from a visit to Berwick, or York, or Chester, the importance of the defence, against private as well as public violence, which a mediæval town derived from its circumvallation[5]. And it was natural enough that a reverence for religious edifices should lead mediæval criminal lawyers to extend also to churches the

[1] *Supra*, p. 161.

[2] See Stephen, *Dig. Cr. Law*, Arts. 341—346.

[3] Spelman's *Glossary*, tit. "Burglary."

[4] Just. *Inst.* II. 1. 10.

[5] The original importance of this form of the crime is illustrated by the very derivation of the word "burglary," which Prof. Skeat traces to the old French *bourg* (town), and *lere* (robber).

full protection of the penalties which guarded a dwelling-house—an extension for which Lord Coke offers the verbal justification that "a church is the *dwelling-house* of God[1]."

Much technicality has arisen in determining what buildings are to be regarded as "houses," and when a house is to be regarded as being "dwelt" in. Clearly a house must be something more than a mere tent or booth[2], it must be a permanent structure. But it is not necessary that it should consist of the whole of such a structure. Thus one building may contain several dwelling-houses; each single set of chambers, or even each single room, in it may be a separate dwelling-house[3]. The test of separateness is merely whether or not there is internal communication between this part of the building and the rest of it[4]. If any one occupier's part has no internal communication with other parts, it becomes a separate house. Conversely, a house is regarded as including its accessory buildings that stand outside its own walls, if only they (*a*) stand in the same curtilage[5] with the house, and (*b*) are occupied along with it, and (*c*) communicate with it either directly or at least by a covered and enclosed passage[6]. So to "break" an area gate, for the purpose of gaining admittance to the house through an open door in the area, is not a breaking of the house itself[7].

But a building, although it be a "house," is not to be regarded as being "dwelt" in unless some person habitually sleeps there[8], and sleeps in it as his *home*. He must thus be a member of the household that occupies it[9]—whether as

[1] 3 Coke *Inst.* 64.
[2] 1 Hawk. c. 38, s. 35.
[3] As in colleges; 3 Coke *Inst.* 65.
[4] *Rex* v. *Egginton*, 2 B. and P. 508.
[5] The "curtilage" is the ground immediately round the house, such as passes upon a grant of the messuage without being expressly mentioned.
[6] 24 and 25 Vict. c. 96, s. 53.
[7] *Rex* v. *Davis*, R. and R. 322 (K. S. C. 160).
[8] *Rex* v. *Martin*, R. and R. 108 (K. S. C. 161).
[9] *Rex* v. *Harris*, Leach 701 (K. S. C. 163).

himself the possessor of the house or only as one of that possessor's family or servants—and not a mere temporary caretaker, whose home the place is not. But though he must sleep there habitually, he need not do so invariably; *i.e.*, his residence may at intervals be interrupted. If a householder goes away from home, but with an *animus revertendi*, his house is still considered to be a dwelling, although not a single person remains in it[1].

(2) *The Breaking.* This may be either actual or constructive. It is considered as "actual" whenever the intruder displaces any part of the building or of its closed fastenings. It is therefore not necessary that there should be an actual fracture of anything. Drawing a bolt, or turning a key, or even lifting a latch will suffice[2]. And, similarly, if a window is closed, even though its sash be kept in position by nothing but the pulley-weight, merely to move the sash will amount to a "breaking[3]." So, too, will the raising of a cellar flap even though it be held down by nothing more than its intrinsic weight[4]; or the turning of a swing window[5]. Yet if a window or door be already partly open, it will not be a "breaking" to open it still further[6] and gain admittance thereby. For when a householder leaves a window or a door partly open, he gives, as it were, a visible invitation to enter; but the fact of his having left it merely unbolted is not thus conspicuous to the passers-by.

But besides these so-called "actual" breakings, in which the intruder himself displaces the fastenings of the house, the definition of burglary is interpreted as extending even to cases in which the breaking is a purely "constructive" one. Such cases may arise (*a*) where the displacement has

[1] *Rex* v. *Nutbrown*, Foster 76 (K. S. C. 164); and see Popham 52 (K. S. C. 164).

[2] 3 Coke *Inst.* 64.

[3] *Rex* v. *Haines*, R. and R. 451 (K. S. C. 167).

[4] *Rex* v. *Russell*, 1 Moody 377.

[5] *Rex* v. *Hall*, R. and R. 355.

[6] *Rex* v. *Smith*, 1 Moody 178 (K. S. C. 168).

been effected by some authorised person (some innocent member of the household), or even (*b*) where there has been no displacement at all.

In (*a*) the burglar, by force or fraud, gets some inmate of the house to open it; but, though it is thus opened to him by consent, that consent is deprived of all its ordinary legal effect by the way in which it was obtained. Thus if an intending burglar gains admittance to the house by threats of violence, which put the inmates into such fear that they open the door to him, there is a constructive breaking[1]. Or, again, if, as is more common in modern times, he rings the bell like an ordinary visitor, and then, when the door is accordingly opened to him, he comes in on pretence of wanting to speak to some member of the household, this is held to be as true a breaking as if he had himself opened the door. "For the law will not endure to have its justice defeated by such evasions[2]." But if a pretence thus attempted should fail to deceive, (so that, though the door be opened to the evil-doer, it is opened solely for the purpose of entrapping him), the law does not regard such an opening as being in any way *his* act, and therefore does not hold it to be, even "constructively," a breaking[3].

We have said that (*b*) a constructive breaking may also occur even though nothing whatever be displaced. This occurs where the burglar comes into the house by some aperture which, by actual necessity, is permanently left open. There is thus a sufficient "breaking" if the thief comes down into the house by the chimney[4]; though there would be no

[1] *Rex* v. *Swallow*, 2 Russ. Cr. (6th ed.) 8.

[2] 1 Hawkins P. C. 287.

[3] *Reg.* v. *Johnson*, C. and M. 218 (K. S. C. 171).

[4] *Rex* v. *Brice*, R. and R. 450. Cf. the case tried at Cambridge by Sir Matthew Hale, 1 Hale P. C. 552; and an American case (*The State* v. *Donohoe*, 36 Alabama 271). In the latter, the chimney proved to be of such inadequate dimensions that the burglar stuck fast in it, and it had to be pulled down to extricate him.

breaking if he came in through a window which the builders had left unglazed.

It should be added that "breaking," whether actual or constructive, need not be committed upon the external parts of the house; it will be sufficient for instance, if an inner door be "broken." And therefore if a robber gain admittance to a house by means of an open window or door, but then, when inside, proceed to unlock a parlour-door, he from that moment becomes guilty of burglary[1]. The same principle holds good, of course, in the case of a servant or guest who, whilst resident in the house, opens the door of any of the rooms for a felonious purpose. But whether this is to be extended to the opening of the door of a mere cupboard in the wall is very doubtful[2]. There is certainly no burglarious "breaking" in opening the door of a mere piece of movable furniture, like a sideboard or bureau.

At common law, to break out of a house did not amount to a burglarious breaking[3]. But by statute[4] it is now provided that if a person who has committed a felony in a dwelling-house—or even has entered a dwelling-house with the intention of committing a felony—shall proceed to break out of this dwelling-house by night, he is to be held guilty of a burglary. Thus while both a breaking and an entering are necessary, either of them may now precede the other.

(3) *The Entering.* The entry may be sufficiently made by the insertion of any part of the intruder's own body, however small that part be. Thus a finger, or even a part of a finger[5], will suffice. And there may even be a sufficient entry—without any part whatever of the man himself having come into the house—by his merely inserting some instru-

[1] 1 Hale P. C. 553.
[2] 1 Hale P. C. 527; Foster 108.
[3] 1 Hale P. C. 554.
[4] 24 and 25 Vict. c. 96, s. 51, re-enacting 7 and 8 Geo. IV. c. 29, s. 11.
[5] *Rex* v. *Davis*, R. and R. 499 (K. S. C. 172).

ment which he is holding. But in this case, a subtle distinction is drawn. The insertion of an instrument, unlike that of a limb, is not regarded by law as constituting an entry, unless it were thus inserted for the purpose (not merely of entering or of breaking but) of accomplishing that ulterior felony for the sake of which the house is being broken into. Thus if a man pushes a bar through a window for the simple purpose of making a hole in the shutter, there is only a breaking, but no entry[1]. Yet if he had pushed the bar through the window for the purpose of drawing towards him a spoon which he was going to steal, there would have been both a breaking and also an entry[2]. So, again, it would be no entry to push a pistol through a window, merely in order to make an aperture to get in at. But if after having broken a window, he were to thrust a pistol through the hole, in order to shoot one of the persons in the room, this would be a sufficient entry[3]. Perhaps the best justification that can be given, for this very technical distinction as to entry by instruments, is that if the mere insertion of an instrument were always to be sufficient to constitute an "entry," most of the common acts of breaking would of themselves include an entry, whereas the definition evidently supposes the two things to be quite distinct.

(4) *The Time.* In the earliest law, burglary might be committed in the day-time as well as at night[4]. But afterwards it became essential that it should take place at night. By "night" was then understood the period between sunset and sunrise. Later, however, it was held not to be night if there was even sufficient sun-light to tell a man's face. This test again has now been discarded, and by 24 and 25

[1] Cf. *Rex* v. *Rush*, 1 Moody 183 (K. S. C. 174).
[2] *Rex* v. *Hughes*, Leach 406 (K. S. C. 173); 1 Anderson 114 (K. S. C. 173).
[3] 1 Anderson 114 (K. S. C. 173).
[4] Pollock and Maitland, II. 491.

Vict. c. 96, s. 1 (following an Act of 1837), night is defined as the period between 9 p.m. and 6 a.m. As to the precise instant when that period begins and ends, it should be noted that here, (as always when a reference to time occurs in an Act of Parliament or other legal instrument, without the expression of a contrary mode of reckoning), it is to be understood to be *Greenwich* mean time[1].

To constitute a burglary, then, the breaking must always take place during this statutory night-time. And if, as is usually the case, the breaking precedes the entering, both must take place at night, though not necessarily on the same night[2]. But if the entry precedes the breaking, *i.e.*, if the latter is not a breaking-in but a breaking-*out*, the entry need not be at night[3].

(5) *The Intent.* There must be an intention to commit some felony[4], (*e.g.*, to kill[5], or to commit a rape[6], most commonly it is an intention to steal); though it is not necessary that the felony should actually be accomplished. Moreover this intention must exist at the time of the breaking, and not arise merely after the intruder has got into the house. Hence if people break open the front door of a house illegally, but only for some honest purpose, (*e.g.*, constables acting with an invalid search warrant), and then are so tempted by the sight of something inside that they steal it, they will not be guilty of any burglary[7].

Accordingly if only a tort, or even a misdemeanor, be intended—as, for instance to get a night's shelter, or to commit an adultery or an assault—the breaking and entering for such a purpose will not be burglary, but either a mere

1 43 and 44 Vict. c. 9, s. 1. In the case of Ireland, Dublin mean time is taken.

2 1 Hale P. C. 551; *Rex* v. *Smith*, R. and R. 417.

3 24 and 25 Vict. c. 96, s. 51.

4 3 Coke *Inst.* 63.

5 Kelyng 67 (K. S. C. 176).

6 *Rex* v. *Locost*, Kelyng 30; *Rex* v. *Gray*, 1 Strange 481.

7 *Rex* v. *Gardiner*, Kelyng 46 (K. S. C. 178).

civil trespass and no crime at all, or, if a crime, only an attempt to commit a misdemeanor. And thus, in 1770, where a man broke into a stable and cut the sinews of a horse's fore-leg in such a manner that it died, but it was shewn that his intention had not been to kill the horse (which would even then have been a felonious act) but only to maim it, so as to prevent it from running in a race, he was held not to have committed a burglary[1]. For in 1770, although killing a horse had already been made a statutory felony, any lesser injury to the animal was merely a tort. At the present time it is a felony, not only to kill but, even to maim a horse[2].

The fact that the burglar actually committed some felony in the house, is excellent evidence that he broke and entered it with an intention of committing this felony[3]. Thus if he drank some wine which he found in the dining-room, this theft would be evidence, though certainly only weak evidence, that he entered the house with intent to steal. In the great majority of cases the question of intention will resolve itself simply into "Plunder or Blunder?" Drunkenness may be useful as evidence to support the latter alternative. But the question is not always an easy one to answer, and it often has to be determined by a somewhat weak chain of inference. Thus in 1899 a boy broke into a house while the family were away; but contented himself with winding up all the clocks and setting them going. Had he been detected before he had undertaken this comparatively innocent course of action, he might have found it difficult to rebut the inference that he had broken into the house for purposes of theft.

Under 24 and 25 Vict. c. 96, s. 52, the maximum punishment for burglary is penal servitude for life. The same

[1] *Rex* v. *Dobbs*, 2 East P. C. 513 (K. S. C. 176). The stable was part of a dwelling-house.
[2] 24 and 25 Vict. c. 97, s. 40.
[3] 1 Hale P. C. 560; 2 East P. C. 514.

enactment deals also with some statutory nocturnal offences, which are approximations to burglary, but much less heinous than it. We may mention the following:—

1. Entering (*i.e.*, without breaking) a dwelling-house, by night, with intent to commit felony therein, is a felony. It is punishable with seven years' penal servitude[1].

2. Being found by night in a dwelling-house, (*i.e.*, although the entry may have been effected only in the day-time), with intent to commit felony therein, is a misdemeanor. It is punishable with five years' penal servitude[2].

3. Being found by night in possession of housebreaking implements, without lawful excuse, is a misdemeanor. It is punishable with five years' penal servitude[3].

We have seen that burglary is essentially a nocturnal offence. To do in the day-time what it would be a burglary to do at night, was at common law a mere misdemeanor. It was known as Housebreaking. But statutory enactment has now erected it into a felony. It is identical with burglary so far as concerns the breaking, the entry, and the intention that it requires. But in some points it differs from burglary. Thus (1) it is not limited to any particular hours. An indictment for burglary must state that the offence was committed at night; but an indictment for housebreaking does not allege that the offence was committed by day,—it omits all reference to time. Again, (2) it extends to a wider range of buildings; including, besides dwelling-houses, mere shops, warehouses, etc. And (3) it admits of different maxima of punishment accordingly as the ulterior felony intended is actually committed or not. For, under the Larceny Act, 1861, it is punishable with penal servitude (1) for fourteen

[1] s. 54. [2] s. 58. [3] *Ibid.* See p. 5, *supra*.

years, if that ulterior felony is actually committed[1]; but (2) only for seven years, where nothing more is proved than that the breaking and entering were effected with the intent to commit some felony[2]. A breaking *out* will suffice in the first of these two forms, but not in the latter. In either case, instead of penal servitude, imprisonment for not more than two years may be imposed, with or without hard labour.

We have seen that the definition of burglary includes a sacrilegious form, in which the place broken into at night is a church. Modern enactments have, in addition, created a statutory form of sacrilege which differs from that just now mentioned, (1) in being irrespective of the hour of the day, and (2) in extending to other places of worship besides those of the established religion. For, under provisions that are now consolidated in the Larceny Act, 1861, it is a felony, punishable with penal servitude for life[3], to break and enter and commit a felony in—or to enter and commit a felony in and then break out of—a church or chapel or meeting-house. And it is also a felony, but punishable with only seven years' penal servitude, to break and enter such a place with the intention of committing a felony, though without accomplishing that intention[4]. In either case, instead of penal servitude, imprisonment for not more than two years, with or without hard labour, may be imposed.

It will readily be observed that the definitions of both burglary and housebreaking are wide enough to cover, along with acts of heinous guilt, others of a very trivial character. In 1801, Andrew Branning, a boy of thirteen (to whom three witnesses gave a good character) was sentenced to death for burglary, in having, after sunset but before closing-time, broken a pane of glass in a shop window and put his hand through the hole, and so stolen a spoon that lay inside[5]. And

[1] 24 and 25 Vict. c. 96, s. 56 (following 7 and 8 Geo. IV. c. 29, s. 15).
[2] *Ibid.* s. 57. [3] *Ibid.* s. 50. [4] *Ibid.* s. 57.
[5] Old Bailey Sessions Papers, LXXVIII. 104.

in 1833 a boy of nine was sentenced to death for housebreaking, in having, during the day-time, pushed a stick through the paper which patched a broken pane in a shop window, and put his hand through the hole, and so stolen two pennyworth of paints that lay inside. The latter boy, however, was not executed; and probably Branning was not.

CHAPTER XIII.

LARCENY.

§ 1. Historical.

We now pass from the offences which consist in destroying or damaging a man's property, to those which consist in depriving him of the enjoyment of it, though probably leaving the property itself uninjured. Of such offences the most ancient in English law is Larceny[1]. The rules relating to it can be traced back through a history of several centuries; and they have now become so complex as to be scarcely intelligible without a knowledge of their historical development.

Some seventeen hundred years ago, the jurist Paulus elaborated for Roman law a definition of the offence of Theft (*furtum*); which subsequently received legislative approval from Justinian. Bracton, more than a thousand years afterwards, embodied this definition, with some verbal alteration, in his account of English law as it then stood, in Henry III.'s reign. His words are: "Contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit[2]." ("The fraudulent dealing with another man's property against his will, with an intention of stealing it.") Bracton thus retains the wide Roman idea of theft, as including any kind of dealings (*contrectatio*) by which a dishonest appropriation could be effected. But it would seem that, in so doing,

[1] Stephen, *Hist. Cr. Law*, III. 121—176; *Dig. Cr. Law*, Arts. 304—384.

[2] Bracton, III. 32. 1. The words of Paulus had been "Contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei vel etiam usus ejus possessionisve." *Digest*, XLVII. 2. 1. 3.

he greatly exaggerated the comprehensiveness of the English idea of theft. Here, as in all Germanic nations, that idea was too crude to go beyond punishing such dishonest dealings as took the "violent and unmistakeable form of a change of possession[1]." This narrow conception was subsequently narrowed still further by various subtleties which were introduced by judicial decision. Some of these limitations would seem to us unaccountable, if we did not know that they had been inspired by motives of humanity. The desire of avoiding capital punishment—and in later times that of restricting the number of offences in which, by the old procedure in trials for felony[2], the accused person was denied the support of counsel and witnesses—led our mediæval judges to invent ingenious reasons for depriving many acts, that seemed naturally to fall within the definition of larceny, of all larcenous character. So extreme was the severity of the law of larceny that it exacted death as the penalty for stealing, except when the thing stolen did not exceed the value of twelve pence. This severity was ultimately tempered by two active forces. One was what Blackstone[3] leniently terms "a kind of pious perjury" on the part of juries; who assessed the value of stolen articles in a humanely depreciatory manner. Thus a silver cup has been known to be valued on the purely conjectural hypothesis that it *might* be of copper barely silvered over. And in 1808, to avoid convicting a woman for the capital offence of "stealing in a dwelling-house to the value of forty shillings," a jury went so far as to find on their oaths that a £10 Bank of England note was worth only 39*s.*[4] The other force which similarly

[1] Pollock and Maitland, II. 497. "There can we think be little doubt that the 'taking and carrying away,' upon which our later law insists, had been from the first the very core of the English idea of theft"; *ibid.*

[2] *Supra*, p. 94.

[3] 4 Bl. Comm. 289.

[4] *Rex* v. *Bridget Macallister* (Sessions Papers, LXXXVI. 18). Sir S. Romilly, citing this case in Parliament, mentioned another, in 1732, where a woman had stolen two guineas and two half-guineas, but the jury pronounced the total value of the four coins to be "under 40*s.*"

struggled against putting men to death for thefts was that of the ingenious judicial legislation, to which we have already referred. By it, as early as the reign of Edward III., many articles were placed outside the protection of the law of larceny on the ground of their supposed connexion with immovable property, as for instance, title deeds to land, or even the boxes in which such deeds were kept. Again, under Edward IV., the judges declared certain acts of dishonest appropriation to be no larcenies, on account of their not involving a sufficient change of technical possession.

By these and other modifications, the legal idea of larceny has now come to be that of the crime which is committed when any person (1) takes, and (2) carries away—or when (3) a bailee appropriates—(4) another person's (5) personal chattel, (6) of some value, (7) without any claim of right, and (8) with an intention to deprive that other person of the whole benefit of his title to the chattel[1]. Blackstone, with attractive brevity, defines it simply as "the felonious taking and carrying away of the personal goods of another[2]"; but thereby leaves unanswered the main question, viz., when is such an act felonious?

We must proceed to consider separately the eight points which our own definition includes.

§ 2. The Taking.

We have seen that the common law made a change of possession essential to larceny. Where there was no infringement of possession, *i.e.*, no "trespass," there could be no larceny[3]. Thus the definition of this felony became embarrassed with "that vaguest of all vague questions—the meaning of the word Possession[4]." The utter technicality of that question is vividly illustrated, for instance, by the

[1] Cf. 3 Coke *Inst.* 107; East P. C. c. 16, s. 2.
[2] 4 Bl. Comm. 230.
[3] 1 Hawkins P. C. c. 33, s. 1; Dalton 493 (K. S. O. 211).
[4] *Per* Erle, C.J., in *Reg.* v. *Smith*, 6 Cox 554.

legal theory of conjugal life. A wife is held to be one person with her husband; and therefore a possession by her is possession by him. Consequently an appropriation of his goods by her would not constitute a change of possession; and therefore did not at common law constitute a larceny[1]. Nor did even adultery put an end to this. So if a wife went away with money of her husband's, and then met her adulterer and gave him this money, he could not be convicted of receiving stolen goods; for they had not been "stolen[2]." Yet if the adulterer had instead assisted her in the original taking of the goods, he could have been convicted of a larceny of them[3]; for then he would have taken them out of the actual possession of the husband himself. Now, however, by the Married Women's Property Act, 1882[4], both husband and wife are criminally liable for stealing each other's property, if (*a*) they were not living together at the date of the offence, or if (*b*) the property was appropriated with a view to their ceasing to live together. But when they once again are living together no prosecution can take place. Thus a wife, so long as she has no intention of ceasing to cohabit with her husband, retains even under the Act of 1882 her immunity for committing thefts of his property[5]. And even if she were to abscond from him temporarily and to take away with her some of his property, but in the expectation of ultimately returning to him and bringing it back with her then, she would commit no larceny. For she would not satisfy the final clause of the definition of the offence; since she does not intend to deprive him of the whole future benefit of the property.

[1] Y. B. 21 Hen. VI. 455; 3 Coke *Inst.* 110; *Rex* v. *Harrison*, Leach 47 (K. S. C. 274).

[2] *Reg.* v. *Streeter*, L. R. [1900] 2 Q. B. 601 (K. S. C. 367).

[3] *Reg.* v. *Featherstone*, Dearsly 369 (K. S. C. 274).

[4] 45 and 46 Vict. c. 75, ss. 12, 16.

[5] *Reg.* v. *Smith*, L. R. 1 C. C. R. 266; *Reg.* v. *Streeter*, L. R. [1900] 2 Q. B. 601 (K. S. C. 367).

But the necessity of protecting masters against the dishonesty of their servants soon caused the judges to make an extension of the legal conception of changes of possession. It came to be held[1] that it was sufficient if, without any change in the actual holding of an article, there were a change of what, by a mere fiction of law, was regarded as equivalent to possession—*i.e.*, of a merely "constructive" possession. Thus, where a butler has his master's plate in his keeping, or a shepherd is in charge of his master's sheep, the *legal* possession remains with the master; and similarly the landlord of an inn retains the legal possession of the silver forks and spoons which his customers are handling at the dinner table. In all such cases,—where one person has physical possession and yet the legal possession is "constructively" in some one else—the former person is not said in law to have a "possession," but only "charge" or "custody." If, however, he proceeds to appropriate the thing—*e.g.*, if the shepherd sells a lamb out of the flock—he thereby converts his custody into a "possession": (*i.e.*, into a "legal," though not a *lawful*, possession). Accordingly by thus converting to his own use the thing entrusted to him, and thereby ceasing to hold it on that trust, the servant is regarded in law as creating a new possession, and thereby constructively "taking" the thing, so as to become as truly guilty of larceny as if he had never had it in his custody at all.

Many other cases, too, besides that of master and servant, may be found, in which the legal possession is divorced from the physical possession, and in which accordingly it would be a constructive "taking," and therefore a larceny, for the custodian to appropriate the article to himself, though he thus actually holds it. One such case arises whenever the owner of a portmanteau delivers it to a lad to carry for him to his hotel, but accompanies the lad on his way and has no intention of relinquishing the full control over the port-

[1] Y. B. 21 Hen. VII. Hil. pl. 21 (K. S. C. 216).

manteau[1]. Similarly where at a railway booking-office a lady handed a sovereign to a man to get her ticket for her (he being nearer than she to the office window), it was held that in point of law she still retained possession of the sovereign; consequently, when the man ran off with it, he became guilty of larceny[2]. So, again, a cabman does not get legal possession of his passengers' luggage when he puts it on the top of his cab; hence if the passengers, on quitting the cab, left some article behind them, it would be a larceny, even at common law, for the cabman to appropriate it[3].

Recurring to the particular case of servants, it may be convenient to note here that when it was not by the master himself, but by some third person, that chattels were entrusted to a servant, they are held to be not in the servant's mere custody, but in his full legal possession. Such chattels do not—in *criminal* law (see below, p. 228)—pass into the possession of the master until they are actually delivered to him; as by the money being placed in his till. Accordingly, if the servant appropriates them whilst they are only on the way towards such a delivery, he does not commit larceny. Indeed until 1799 such an appropriation did not constitute any crime at all. But in that year a statute was passed making such conduct felonious[4]. It constitutes the crime of Embezzlement, which we shall hereafter deal with in detail[5]. A dishonest servant commits embezzlement in the case of things which he has received *for* his master; but larceny in the case of those which he has received *from* his master.

[1] Cf. 2 East P. C. 683.

[2] *Reg.* v. *Thompson*, L. and C. 225.

[3] *Lamb's Case*, 2 East P. C. 664; *Reg.* v. *Thurborn*, 1 Den. 387 (K. S. C. 276).

[4] 39 Geo. III. c. 85.

[5] *Infra*, ch. xiv.

§ 3. The Carrying Away.

Grasping a thing is sufficient to confer possession of it, *i.e.*, to constitute a "taking"; but it does not amount to an "asportation," *i.e.*, to a carrying away. Thus where *A* stopped *B*, who was carrying goods, and bade him lay them down, which *B* did, but *A* was arrested before he could touch them, it was held that *A* had not committed larceny; for there had been no carrying away. But the slightest removal will suffice; and this, even though the thief at once abandon the thing[1]. Thus there is a sufficient asportation in taking plate out of a chest and laying it on the floor[2]; or in shifting a bale from the back of a cart to the front; or in pulling a lady's ear-ring from her ear, even though the ear-ring be caught in her hair and remain in it[3]. The test seems to be,—Has every atom left the place in which that particular atom was before? So there may thus be a sufficient carrying away even though part of the thing still occupies the place which some other part of it previously did; *e.g.*, by half-drawing a sword from its scabbard, or lifting a bag part-way out of the boot of a coach[4], or pulling a pocket-book not quite out of a man's pocket[5]. There is, indeed, a case in which the raising of a bale of linen cloth from a horizontal to a perpendicular position was held not to be an asportation[6]. But here, as the bale was flexible, moving the one end of it would not necessarily cause the other end to move.

§ 4. Appropriation by a Bailee.

Where the proprietor of an article temporarily entrusts not merely the physical but also the legal possession of it to

[1] *Rex* v. *Amier*, 6 C. and P. 344 (K. S. C. 220).
[2] *Rex* v. *Simson*, Kelyng 31 (K. S. C. 219).
[3] *Rex* v. *Lapier*, Leach 320 (K. S. C. 222).
[4] *Rex* v. *Walsh*, 1 Moody 14 (K. S. C. 220).
[5] *Rex* v. *Thompson*, 1 Moody 78 (K. S. C. 221).
[6] *Rex* v. *Cherry*, Leach 236, 321 (K. S. C. 218).

another person, *e.g.*, to a carrier, a "Bailment" arises. The temporary possessor, or bailee, was at common law not indictable for larceny[1], for as he (unlike a "custodian") had possession—legal as well as actual—of the article, it was impossible for him to "take" it[2]. Here, again, it was the necessities of domestic life that first compelled an extension of the law. In the case of its being to one of his own servants that the proprietor of an article thus entrusted the legal possession of it, an appropriation by that servant was made criminal by statute so early as Henry VIII.'s reign[3]. But, in regard to all other bailees, the common law rule remained in force for some three hundred years longer. The judges had, however, so far back as the reign of Edward IV.[4], engrafted upon it the subtle distinction that if any bailee dishonestly severed into separate parts the article bailed to him—*e.g.*, by drawing a pint of beer from the cask he was carrying—he thereby put an end to that possession of the Thing, as a unity, which he held under the bailment. Accordingly a subsequent appropriation by him of any of the parts thus separated—as by his drinking the pint of beer—would amount to a "taking" of that part, and so would be larceny. This rule as to "breaking bulk" brought within the reach of punishment many cases of dishonest appropriation. And in 1691 Parliament interposed, to extend the law of larceny to lodgers who stole the furniture of the rooms that had been let to them[5]. But it was not till 1857 that any general provision was made for dealing comprehensively with misappropriation by bailees. In that year a statute was

[1] See Pollock and Wright on Possession, pp. 160—171.

[2] Contrast the wider sweep of the Roman law of Furtum, *Dig.* XLVII. 2. 52. 7.

[3] 21 Hen. VIII. c. 7.

[4] *The Carrier's Case*, Y. B. 13 Ed. IV. f. 9, Pasch. pl. 5 (K. S. C. 223). Stephen looks upon the decision in this case as an extraordinary one; and thinks it obvious that it was a compromise intended to propitiate the Chancellor, and perhaps the King (*Hist. Cr. Law*, III. 189).

[5] 3 W. and M. c. 9, s. 5; see now 24 and 25 Vict. c. 96, s. 74.

passed making it larceny for a bailee to appropriate to himself the articles entrusted to his charge[1]. This has since been replaced by a clause in the Larceny Act of 1861[2], which provides that it shall be larceny for a bailee fraudulently to convert any chattel, money, or valuable security to the use of himself, or of any person but the owner; even though he do not determine the bailment by breaking bulk or otherwise. Wide as these words seem to be, their effect has been restricted, by judicial decision[3], to those bailments alone under which it is the bailee's duty to deliver up at last (whether to the original owner or to some one else), the identical article bailed and not merely an equivalent for it. Accordingly a land-agent usually cannot be indicted under this statute for stealing the rent he has collected. Nor can the auctioneer who sells an article for you and then absconds with its price. Before the sale he was a bailee of the article, and was bound to dispose of it according to your directions. But after the sale he does not become a similar bailee of the money which he has received for it, inasmuch as he is not bound to deliver to you the identical coins[4].

In the case by which the principle was established, *Reg.* v. *Hassall*[5], the prisoner was treasurer of a money club, and had authority to lend to its members sums out of the club-money in his hands. He misappropriated part of this fund. It was held that he was not a bailee within the Act; since he was under no obligation to pay over to anybody the specific coins which had been paid to him. During the forty years which have elapsed since this case was decided, its authority has remained unimpeached; but the tendency has been to restrict rather than to enlarge the immunity which it establishes. Thus it has been held that there was a duty to deliver over the specific coins received, in some cases where at

[1] 20 and 21 Vict. c. 54, s. 17.
[2] 24 and 25 Vict. c. 96, s. 3.
[3] *Reg.* v. *Hassall*, Leigh and Cave 58 (K. S. C. 227).
[4] Cf. Paulus in *Digest*, XVII. 1. 22. 7.
[5] Leigh and Cave 58.

first sight it might have been supposed that the parties had not created any such obligation. Thus in *Reg.* v. *Aden*[1] a bargeman, who had been entrusted with £24 to buy a barge-load of coals, and who appropriated this money, was convicted of larceny under the statute; apparently on the ground that it was his duty to pay for the coals with the actual coins which the prosecutor had given him. And, similarly, in *Reg.* v. *De Banks*[2], where the prisoner sold a horse for the prosecutor and appropriated the purchase-money he received, there was held to be evidence of his holding this money under such a bailment as would come within the statute. (There is nothing unreasonable in making such a bailment, even of a "fungible" thing like money. It has even been said, and by judges so eminent as Lord Wensleydale and the late Mr Justice Willes, that *whenever* a servant receives money for his master from anyone he is bound to hand over the very same coins that he received[3].) It has been pointed out by the present Master of the Rolls[4] that, whilst Aden or De Banks was a mere bailee of a fixed sum which he had only to hand over, Hassall's club-money was left in his hands as a fund which he had to deal with, so that he was a trustee of it, with complex duties to discharge.

It should be noticed that the idea of bailment is not confined to cases where the article has been in the bailor's own possession before it was delivered to the bailee[5]. Thus if a vendor of goods deliver them to a carrier for conveyance to the purchaser, it is the latter that is regarded in law as the bailor; for the vendor, who actually handed them over to the bailee, is regarded as having done so only as an agent for the purchaser[6]. It must also be noticed that bailment requires nothing more than simply a delivery upon a trust.

[1] 12 Cox 512. [2] L. R. 13 Q. B. D. 29. [3] L. and C. 62.
[4] *Reg.* v. *Governor of Holloway Prison*, 18 Cox 631 (K. S. C. 229).
[5] See *Reg.* v. *Bunkall*, L. and C. 371 (K. S. C. 231).
[6] Benjamin on Sales, Book I. Part I. ch. 4.

Hence, though there is usually also a contract, express or implied, to fulfil this trust, there may quite well be a bailment even where no such contract can exist, as when goods are delivered to some person who is incapable of contracting. Accordingly, if an infant hires furniture, though no valid contract of hiring may arise[1], he nevertheless becomes a bailee. Consequently, if he proceeds to sell the furniture, he will be guilty of larceny under this statute[2].

Before a bailee can be convicted of larceny, it must be clearly shewn that he has really converted to his own use the article entrusted to him. Only some act of conversion that is quite inconsistent with the bailment can amount to a sufficient appropriation[3]. In the case of a bailment of silver forks for use, melting them down would of course always be evidence of a conversion; and so would selling them. But as to pawning, a distinction must be drawn. If the bailee can shew that when he pawned the goods he honestly intended to redeem them subsequently (which might very well be made out by instances of his previous similar conduct), and can also give proof of there having been a full prospect of his getting money enough to carry out this intention, the pawning will not amount to a conversion. But if he had merely a vague intention to redeem the goods at some future time if he should happen to become able to do so, then he clearly acted in a manner quite inconsistent with his duties as bailee, and so became guilty of larceny[4]. It may be well to point out that when once a bailment has come to an end, and the article bailed has returned into the possession of its proprietor, no contracts subsequently made about it by the ex-bailee—such, for instance, as a bargain by him to sell it—can amount to a conversion[5]. This seems obvious enough;

[1] Anson on Contracts, Part II. ch. III. s. 2.
[2] *Reg.* v. *Macdonald*, L. R. 15 Q. B. D. 323.
[3] *Reg.* v. *Jackson*, 9 Cox 505 (K. S. C. 235).
[4] *Reg.* v. *Medland*, 5 Cox 292 (K. S. C. 236).
[5] *Reg.* v. *Jones*, C. and M. 611 (K. S. C. 237).

but a student may sometimes be apt to overlook it, in consequence of the difficulty of tracing the changes in the legal possession.

It is desirable to notice that there does not exist, as seems to be sometimes supposed, a specific offence entitled "larceny by a bailee." The statute simply places conversion by a bailee on the footing of ordinary larceny; so that an indictment for it need not even contain the word "bailee[1]."

§ 5. The Ownership.

Things which do not belong to any determinate owner cannot be the subjects of larceny. One conspicuous example of such things is a human corpse[2]; and accordingly the "resurrection men" who, in the days before the passing of the Anatomy Act[3], used to violate churchyards in order to supply the dissecting-rooms with "subjects," committed no larceny in taking the bodies. (It was otherwise if they carried off a coffin or graveclothes; for these remained the property of the executors who had bought them.) But a consequent question, of much practical importance yet still unsettled, is whether the rule of law must further be taken to be that "once a corpse, always a corpse"; for, if so, the protection of criminal law will not extend even to skeletons and similar anatomical preparations on which great labour has been expended[4], or to ethnological collections of skulls or mummies which have been brought to this country at considerable expense.

Even an article that has an owner may come to be intentionally abandoned by him; and of such "derelict" articles there can be no larceny[5]. Thus abandoned wrecks[6], and

[1] *Reg.* v. *Macdonald*, L. R. 15 Q. B. D. 323.

[2] *Rex* v. *Haynes*, 12 Coke Rep. 113; see L. R. 20 Ch. D. 659.

[3] 2 and 3 Wm. IV. c. 75.

[4] Stephen, *Dig. Cr. Law*, Art 318.

[5] 2 Bl. Comm. 9; *Reg.* v. *Peters*, 1 C. and K. 247; *Reg.* v. *Reed*, C. and M. 307; Justinian's *Digest*, XLVII. 2. 43. 9.

[6] Whales are 'wreck.'

treasure-trove that has no longer any owner, are incapable of being stolen[1], until after they have been taken possession of by the Crown, or by some person to whom the Crown has granted the franchise of taking them.

Animals *ferae*[2] *naturae*, straying at large, form the most important of all the classes of things which have no owner. Even the (so-called) property *per privilegium*, which the lord who has a chartered park or forest is regarded by law as having over certain of the wild creatures in it, is not a sufficient ownership to sustain an indictment for larceny[3]; for it is not so much an ownership as a peculiar right to obtain ownership. For the general principle of law is that all true ownership of living things depends upon actual control over them. Domestic animals (such as horses, oxen, sheep), or domestic fowls (such as hens, ducks, geese), usually have a settled home, and so come under the control of its occupier; and consequently are larcenable[4]. If they are so, their eggs and other produce will equally be larcenable; and this even when the produce is stolen directly from the living animals themselves (as by milking cows[5], or plucking wool from the backs of sheep[6]), before the true owner has ever had possession of it as a separate thing. But over animals that are of a *fera natura* there is usually no control, and therefore no ownership. Ownership over them whilst uncontrolled, if it were to exist, could exist only in the owner of the land where at any moment they were; and it would be futile to recognise any such mutable ownership, which the animal itself might vary from hour to hour. But a power of control may

[1] 22 Lib. Ass. 95, 99; 1 Bl. Comm. 295; Williams' *Personal Property*, 47 *n*.

[2] *Ferae*, here, is of course an adjective. Yet people talk about "hunting and shooting our English *ferae naturae*"; and both Sir Walter Scott (*Antiquary*, ch. XXII.) and Sir W. H. Rattigan (*Jurisprudence*, p. 138) have fallen into like error.

[3] 7 Coke Rep. 17 b.

[4] 1 Hale P. C. 511.

[5] 2 East P. C. 617.

[6] *Rex* v. *Martin*, 1 Leach 171.

of course be created[1]; either *per industriam*, by their being killed, or caught, or tamed[2], or *propter impotentiam*, by their being too young to be able to get away. Consequently larceny may be committed of pheasants which have been shot, or deer which have been so enclosed in a park that they may be taken at pleasure[3]; or of fish in a tank, or even at large in a mere pond, though not when at large in a running stream[4]. Again, young partridges reared under a barndoor fowl and not yet old enough to leave her protection[5], or young stockdoves which cannot yet fly[6], are the subjects of a true ownership, and so are larcenable.

The degree of physical control which is necessary to establish ownership will vary with the habits of the particular species concerned. Creatures may be subjects of ownership although they are not closely confined but are allowed to wander away from home, provided they have a settled habit of returning thither; and this will be so although they are not shut up, even at night[7]. Peacocks, ducks, geese, and pigeons readily acquire this *animus revertendi*; unlike pheasants and partridges. This rule, that the taking of ownerless things[8] cannot be a larceny, still holds good; but the modern statute-law has created many offences of dishonesty which it has not erected into larcenies. And thus deer-stealing[9], the taking of hares or rabbits in warrens in the night-time[10], and the taking of fish from private waters[11],

[1] Williams' *Personal Property*, Part I. ch. I.

[2] *Rex* v. *Rough*, 2 East P. C. 607 (K. S. C. 250).

[3] 1 Hale P. C. 511.

[4] *Ibid.* At Cambridge in 1627, before Harvey, J., two men were convicted of larceny for taking fish out of a net lying in the river; Dalton's *Justice*, 350.

[5] *Reg.* v. *Shickle*, L. R. 1 C. C. R. 159 (K. S. C. 251).

[6] Y. B. 18 Edw. IV. fo. 8, pl. 7 (K. S. C. 249).

[7] *Reg.* v. *Cheafor*, 2 Denison 361.

[8] *The Case of Peacocks*, Y. B. 18 Hen. VIII. pl. 11 (K. S. C. 250).

[9] 24 and 25 Vict. c. 96, ss. 12—15.

[10] *Ibid.* s. 17.

[11] *Ibid.* s. 24.

have been made punishable offences; but they vary greatly in their degrees of heinousness as well as in their punishments[1].

It is important to notice that larceny requires not only an ownership, but an ownership which existed already before the act of taking. Hence a proprietorship that was created only by that very act will not suffice. Thus, although rabbits or wild pigeons, on being killed by a trespasser, become the property of the owner of the land where they are killed[2], yet if this trespasser who kills them should proceed to carry them away, he will not commit larceny thereby. For the ownership which he infringes did not exist before he killed the creatures. Moreover even if, after killing them and taking them into his possession, he should go away and leave them on the land, with the intention of returning for them, and afterwards should so return and take them away, these proceedings will be regarded by law as a single continuous act, and therefore will still constitute no larceny[3]. But if he had left them on the land with the idea of abandoning them altogether, he would thereby have ceased to be their possessor, and they would pass into the legal possession of the owner of the soil[4]; so that if the trespasser should afterwards change his mind and come back and seize them again, this would be an entirely new act of taking. And, as it would be the taking of a thing which now had got an owner, it would be a larceny. Where a man, employed to trap rabbits, put some into a bag in order to appropriate them, and a keeper (suspecting him) nicked them, during his absence, for purposes of identification, it was held that the nicking was not sufficient to reduce them into the possession of the keeper or of his master. Hence the trapper did not become guilty of

[1] *Infra*, p. 221.
[2] *Blades* v. *Higgs*, 11 H. L. C. 621.
[3] *Reg.* v. *Townley*, L. R. 1 C. C. R. 315 (K. S. C. 255).
[4] Cf. *Reg.* v. *Foley*, L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).

larceny by carrying them away, even after they had been thus nicked[1].

But though there can be no larceny of things which have no owner at all, there may be a larceny in spite of the owner being unknown and undiscoverable; as in the case of brass plates being stolen from old coffins in a vault. It is well, however, to bear in mind Sir Matthew Hale's caution never to convict any person of having stolen from a supposed but unknown owner, merely because he has been found in possession of property under suspicious circumstances and will not give an account of how he came by it[2]. Even if a tramp is found to have six gold watches in his pocket, he ought not to be treated as a thief until some definite proof can be obtained of their having actually been stolen somewhere.

In conclusion, we may point out that though there can only be a larceny where the thing (at the time of being stolen) already belonged to some other person, it is not necessary that this person should be a sole owner, or even a full owner. (*a*) He may, for instance, be merely a joint-owner with the thief himself. At common law, indeed, this was not possible; for, as every co-owner is lawfully entitled to the possession of the whole thing, he could not commit larceny by taking it. But now, by 31 and 32 Vict. c. 116, s. 1, a beneficial co-owner or co-partner may be tried for stealing or embezzling, as if he had not been owner. (*b*) Again, even at common law, the person stolen from may be one who had even a less interest than that of a co-owner, no interest beyond a mere right to the possession of the thing stolen,—a mere bailee, to whom the article had been bailed by the thief himself. Thus, paradoxical as it may appear, a man may commit larceny by stealing his own property. For when an owner of goods has delivered them to any one on such a bailment as (like those of pawn and of hire) entitles the

[1] *Reg.* v. *Petch*, 14 Cox 116.

[2] 2 Hale P. C. 290 (K. S. C. 467).

bailee to exclude him from possession[1], that owner may become guilty of larceny, even at common law, if he carries them off from this bailee with any intention to defraud him. He might, for instance, aim at defrauding him by making him chargeable for the loss[2]; or by depriving him of an interest which he had in retaining his possession, such as the lien of a cobbler upon the boots which he has mended, for the cost of the mending[3]. Moreover it will suffice even though the intention was to defraud (not the bailee but) some other person; as where the owner of goods, which are in a bonded warehouse, surreptitiously takes them out, in order to cheat the Crown of the customs-duty payable on them[4]. An old illustration is that of a man who sent his servant on a journey in charge of some valuables, and then disguised himself as a highwayman and robbed the servant of these things, in order to claim their value from the inhabitants of the Hundred, under its ancient liability to make good the loss sustained by a crime of violence committed within its boundaries[5]. But Mr Justice Wright, in his learned Essay on Possession[6], doubts that the owner of a thing can commit any larceny of it by taking it away from a mere bailee at will, such as his own messenger would be.

§ 6. THE SUBJECT-MATTER.

Some of the very early Roman lawyers had thought there might be *furtum fundi locive, i.e.*, that land was legally capable of being stolen. But, even before the time of Gaius, all the jurists came to abandon this view. No one ever held

[1] Williams' *Personal Property*, Part I. ch. I. § 2. 2.

[2] 1 Hale P. C. 513.

[3] Williams' *Personal Property*, Part I. ch. I. § 2. 3. Cf. Justinian, *Inst.* IV. 1. 10.

[4] *Rex* v. *Wilkinson*, R. and R. 470 (K. S. C. 253).

[5] 2 East P. C. 654. (K. S. C. 260.)

[6] Pollock and Wright on Possession, pp. 165, 228. Cf. Bishop's *Criminal Law of U.S.A.*, 8th ed. II. § 790.

it in England. For, since a larceny could only be committed by carrying a thing away, this clearly made it essential that the thing should be movable[1]. Moreover, just as we have seen that some other person's ownership over the thing must exist before the act of theft, and not merely be created by it, so also this movableness of the thing must have existed before it was taken. A thing therefore was not larcenable if it first became movable by the very act of the taking. Thus it is no crime at all to take sand from a pit or a river-bed; or to pull down a wall and carry away the bricks. And it is no larceny to strip woodwork or other fixtures from a house, or to cut down a tree[2]; but these acts have now been made specific statutory felonies[3], so that if a man demolishes some one else's house and sells the materials, he may be proceeded against in respect of the fixtures. Yet, even at common law, there would be a larceny if, after the severance had once been fully completed, the fixtures or the trees were abandoned by the thief but he afterwards changed his mind and returned and carried them away. As Hale says, it becomes larceny if the act is "not continuated but interpolated[4]." But a mere interval of *time* is not sufficient to deprive the act of its continuous (and therefore non-criminal) character, if all the while after the severance the severer retained his intention of possessing the thing. On this point *Townley's Case*[5] may again be referred to, as shewing how a poacher who shot rabbits and hid them in a ditch, and then went away, nevertheless retained "possession," during that interval of personal absence, by mere continuousness of intention. It will be instructive to a student to compare this decision with the case of *Reg.* v. *Foley*[6]. In the latter case a trespasser mowed

[1] See Stephen, *Hist. Cr. Law*, III. 126.

[2] *The Forester's Case*, Y. B. (Rolls Ser.) 11 and 12 Edw. III. 641 (K. S. C. 238). Cf. *Reg.* v. *Pinchbeck* (K. S. C. 355).

[3] 24 and 25 Vict. c. 96, ss. 31, 32.

[4] 1 Hale P. C. 510.

[5] L. R. 1 C. C. R. 315 (K. S. C. 255). *Supra*, p. 195.

[6] L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).

some grass, but left it where it fell; then, after two days, he returned and took it away. It was held by the Irish Court for Crown Cases Reserved that, even if he had a continuous intention, there was not a continuous possession; and, therefore, that his ultimate removal of the grass constituted a larceny. If this case be regarded as at variance with that of Townley, the latter is of course the one to be followed by English courts. But the two may be reconciled if it be thought right to lay stress on the distinction that Townley, unlike Foley, performed an unequivocal act of taking possession, by hiding the rabbits, before he left the field.

It seems strange that land, by far the most important form of wealth in the middle ages, should have been left unprotected by our early criminal law. The omission, however, as Sir James Stephen[1] points out, is rendered more intelligible by the fact that in ordinary cases it is nearly impossible to misappropriate land without resorting to some act which itself is criminal, such as personation or forgery. But a dislike to capital punishment was probably the reason why the judges went still further, and excluded from the scope of larceny even things that really were movable and had only a technical connexion with the land; as when they held it to be no crime to carry off dung which had been spread upon a field[2]. Moreover, even standing corn and similar growing crops, although the law of property gives them to a deceased owner's executors as chattels personal, were held in criminal law to savour so far of the realty as not to be larcenable[3]. Yet, on the other hand, some things which do not thus go to the executor, but to the heir, are larcenable; *e.g.*, some species of heirlooms. It has similarly been held in an American case[4] that though, by a very reasonable rule of law, the keys of a house always pass along

[1] *Hist. Cr. Law*, III. 126.
[2] *Carver* v. *Pierce*, Style 66 (K. S. C. 238).
[3] 3 Coke *Inst.* 109.
[4] *Hoskins* v. *Tarrance*, 5 Blackford 417 (K. S. C. 239).

with it on any alienation (whether by death or by conveyance), the legal identification of them with the realty does not go so far as to prevent its being a larceny to steal them.

In general, however, the rule of immobility extends to all things which any legal fiction identifies with the land, even though they be physically movable. This is the case, for instance, with title deeds[1]; they would not pass under a grant of "all my goods and chattels": hence they are not larcenable. And a sealed-up box, inclosing such deeds, has been held to be so identified with them as itself to become not larcenable[2]. (An additional reason has been given for this non-larcenability of title deeds; namely, that their value is so indefinite that it was impossible to say whether or not they were worth more than 12*d.*, and therefore impossible to frame the indictment duly so as to shew whether the offence was capital or not.) It has now been made a statutory felony to steal, or to destroy, documents of title to land[3]; but such a theft is still no larceny.

It may be convenient here, if not strictly relevant, to mention that, even at common law, gas is larcenable[4]; and that by the Electric Lighting Act, 1882[5], electricity has also been made larcenable.

§ 7. THE VALUE.

A thing is not larcenable unless it possesses some value. "De minimis non curat lex." Otherwise it would, as Lord Macaulay says, be a crime to dip your pen in another man's inkstand, or to pick up a stone in his garden to throw at a bird[6]. But the exact measure of this value has never been

[1] 1 Hale P. C. 510; Stephen, *Hist. Cr. Law*, III. 188.

[2] Y. B. 10 Ed. IV. fo. 14, pl. 9; Dalton, c. 156, s. 8.

[3] 24 and 25 Vict. c. 96, s. 28, re-enacting (with additions) 7 and 8 Geo. IV. c. 29, s. 23.

[4] *Reg.* v. *Firth*, L. R. 1 C. C. R. 172.

[5] 45 and 46 Vict. c. 56, s. 23.

[6] Note N, to his Indian Penal Code.

fixed. Its indefiniteness gave scope for the humane ingenuity of the judges. Hence many things in which a legal property existed, and which were of such appraisable importance that damages could have been recovered in a civil action for taking them away, were held to be below the minimum of value that was necessary to support a conviction for the felony of larceny. A vivid illustration is afforded by the fact that at one time it was doubted whether even jewels had any such intrinsic worth as to be larcenable, "though some do hold them precious[1]." It is clearly settled that the law of larceny affords no protection for such animals as serve neither for draught nor for food[2]. The goat was not held to fall within either of these categories; nor the rook, in spite of the popularity of rook-pies[3]. And clearly there was no crime in stealing cats, ferrets[4], monkeys, nightingales, parrots, or canaries. The principle was applied even to dogs; for "a man's two best friends—his wife and his dog—were singularly disregarded by the old common law[5]." (Yet, for taking a dog, damages could be recovered in a civil action[6] even in very early days[7]; and it was never denied that stealing a dog's collar, or even stealing the dressed skin of a dead dog, would amount to larceny.) Bees, however, though themselves inedible, were a source of food, and consequently were held to be larcenable; and the law similarly protected the hawk when tamed, "in respect of the nobleness of its nature, and its use for princes and great men[8]." A statutory protection, however, though less stringent than that of

[1] Stanford, p. 275, citing Hales, J., temp. Ed. VI.

[2] 1 Hale P. C. 512.

[3] *Hannam* v. *Mockett*, 2 B. and C. 934.

[4] *Rex* v. *Searing*, Leach 850 (K. S. C. 244).

[5] Ingham's *Law of Animals*, p. 57.

[6] Y. B. 12 Hen. VIII. 3. Manwood (*Forest Laws*, p. 99, A.D. 1598) speaks of even mortgages and pledges of dogs, as if quite frequent.

[7] Yet this civil remedy has recently been refused in America, in deference to the old rule of larceny; see 75 Georgia 444.

[8] 1 Hale P. C. 512.

larceny, has been given in modern times to every animal or bird that is ordinarily kept for domestic purposes, or even kept in confinement[1].

The rule which made value essential to larcenability was extended artificially by a fiction which identified the documentary evidence of any right with the right itself, so that if the subject of the right could not be stolen the document could not be. "The accessory must follow its principal." We have already noticed one of the applications of this rule, the case of the title deeds of real property. It was (and is) larceny to steal a skin of parchment before the scrivener has engrossed the words of a deed upon it; but when multiplied manifold in value by engrossment and execution, the parchment passes beyond the protection of the law of larceny. The same principle would apply to documents which were evidence of the right to any mere chose in action[2]; such instruments as a promissory note, or even a contract for the sale of a quantity of unascertained goods. But a document of title to specific goods, which themselves are larcenable, would itself be larcenable; *e.g.*, a pawnbroker's duplicate[3]. This latter instance shews that the legal identification of the evidence with the right evidenced is now the only reason why the thief of a lease or a conveyance cannot be indicted for simply stealing so much parchment. It cannot be (as used to be said) the mere smallness of the intrinsic value of the parchment or paper; for it is now quite clear that an indictment for the larceny of merely "a piece of paper" is good, and counts so expressed are habitually inserted in indictments for stealing post-office letters. Accordingly convictions have taken place for the larceny of proof-sheets[4], of cancelled bank-

[1] *Infra*, p. 222.

[2] Dalton, 501; cf. Williams' *Personal Property*, Introd. § 3. But note also p. 222 (1) *infra*.

[3] *Reg.* v. *Morrison*, Bell 158.

[4] A proof-sheet containing secret information (*e.g.*, a telegraphic cipher-code, or the forthcoming annual report of the Directors of a Company) might have very great pecuniary value to certain persons.

notes[1], of a worthless cheque[2], and of a small slip with memoranda pencilled on it[3]. Indeed the principle is now distinctly laid down that although, to be the subject of larceny, a thing must be of some value to its owner, if not to other people, yet this need not amount to the value of the smallest coin known to the law, or of even "the hundredth part of a farthing[4]." In *Reg.* v. *Clarence*[5], Mr Justice Hawkins even went so far as to say, though only incidentally, that stealing a single pin would be larceny.

To have omitted from our definition of larceny all reference to the element of value would have been to leave unexplained some well established points of law. But it must frankly be admitted that, if the word be thus retained in the definition, it must be understood in some sense which is neither a natural nor even a precise one[6].

§ 8. The Claim of Right.

If property is taken by legal right, obviously no wrong, either civil or criminal, is committed by taking it. But in criminal law immunity is carried still further. An act of taking will not amount to larceny unless it be committed not only without a legal right, but without even any appearance (or, in the old phrase, "colour[7]") of a legal right. Accordingly the ordinary *mens rea*, which is quite compatible with an honest ignorance of law[8], does not suffice to constitute guilt in cases of larceny; for any *bonâ fide* claim that is at

[1] *Rex* v. *Clark*, R. and R. 181.

[2] *Reg.* v. *Perry*, 1 C. and K. 729 (K. S. C. 245).

[3] *Reg.* v. *Bingley*, 5 C. and P. 602.

[4] *Reg.* v. *Morris*, 9 C. and P. 349, *per* Parke, B.

[5] L. R. 22 Q. B. D. 23.

[6] Bishop (II. § 57. 9) treats the rule as now quite obsolete in American law.

[7] Under the *colour* of commending him
I have access my own love to prefer.
Two Gentlemen of Verona, IV. 2.

[8] *Supra*, p. 67.

all reasonable will suffice to deprive the taker's act of any larcenous character. It is a question of fact, for the jury, whether the goods were taken with such a belief or not[1]. But there is high authority for saying that "If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal[2]." The best evidence that there was actually a sincere claim of right is that the goods were taken quite openly[3]. A surreptitious taking, or a subsequent denial of the taking, or a concealment of the goods, goes far to suggest a felonious intent.

The following instances may be suggested in which the carrying off of some one else's goods will be unpunishable, on account of their being appropriated under a *bonâ fide* claim of right.

(1) Where something is seized by a landlord in a distress for rent; even though he be mistaken in thinking that any rent is due, or even though the article seized be one which is privileged by law from being distrained on[4].

(2) Where corn is taken by a gleaner, honestly and openly, in a locality where gleaning is customary[5].

(3) Where the taker believes that what he is taking is his own property[6], or that it is something which he has a right to take, whether as an equivalent for his own property[7] or with a view to mere temporary detention (*e.g.*, by way of lien[8]). Thus, at the Cambridge Assizes in 1897, a nobleman's

[1] *Reg.* v. *Farnborough*, L. R. [1895] 2 Q. B. 484.

[2] East, *Pleas of the Crown*, 659.

[3] 1 Hale P. C. 509; *Causey* v. *The State*, 79 Georgia 564 (K. S. C. 281).

[4] See 1 Hale P. C. 506, 509.

[5] 2 Russell on Crimes (6th ed.), p. 217.

[6] *Rex* v. *Hall*, 3 C. and P. 409 (K. S. C. 280); *Causey* v. *The State*, 79 Georgia 564 (K. S. C. 281).

[7] *Reg.* v. *Boden*, 1 C. and K. 395 (K. S. C. 282).

[8] *Reg.* v. *Wade*, 11 Cox 549 (K. S. C. 283).

housekeeper who, on leaving her situation, had taken away some things belonging to her employer, was prosecuted for a larceny of them. But it appeared that she had an unpaid account outstanding against her employer for expenses incurred by her for him; and that she took away the articles without any effort at concealment, under the mistaken belief that as creditor she had a right to seize her debtor's property and detain it as security for the debt. Pollock, B., accordingly advised the jury to acquit her.

(4) Where the taking is by consent of the owner[1].

Upon this point a question of considerable practical importance often arises in consequence of the plans laid by the police for the detection of a suspected thief. If, for mere purposes of detection, the owner of goods acquiesces in a thief's carrying them off, does such a consent suffice to prevent the thief's act from being a larceny? We have seen that, in burglary, an entry permitted, after an *unsuccessful* attempt to deceive, does not amount to a constructive breaking[2]. Similarly in larceny, if the owner desired that the thief should actually remove his goods, or, still more, if he had employed someone to suggest to the thief the perpetration of the theft, his action would constitute a sufficient consent to render the taking no larceny, although his sole object was to secure the detection of the offender. Yet if he went no further than merely to facilitate the commission of the theft (*e.g.*, by allowing one of his servants to assist the thief), such conduct would no more amount to a consent than if a man, knowing of the intention of burglars to break into his house, were to leave one of the bolts on the front door unfastened[3].

But the owner's consent must of course be a true consent —a free and a full one. Thus it can afford no defence where

[1] *Rex* v. *Macdaniel*, Foster 121 (K. S. C. 259).
[2] *Reg.* v. *Johnson*, C. and M. 218 (K. S. C. 171). *Supra*, p. 173.
[3] *Rex* v. *Egginton*, Leach 913 (K. S. C. 260).

it is obtained from him by Intimidation. In such a case his will is overborne by compulsion; as where the keepers of an auction-room forced a woman to pay for some lots which she had not bid for, by threatening that she should not be allowed to leave the room until she had so paid[1]. Much more frequent than intimidation, however, is Fraud; which is equally effective in removing all exemptive character from an apparent permission. Consent obtained by fraud is not a true consent. Hence wherever an owner's consent to the taking of his goods is obtained *animo furandi,* the deception vitiates the consent. The taker is accordingly guilty of "larceny by a trick." It should be noticed that here he has a guilty intention at the time when he receives the thing from the owner. If he had received it innocently, and had not conceived until afterwards the idea of appropriating it, his conduct would not be larcenous.

In some cases an actual "trick" is carried out, some false artifice or misrepresentation, like those involved in the use of false weights[2], or in the practices of ring-dropping[3] and of "ringing the changes[4]," or in the "confidence trick[5]." Still simpler pretences are a representation by the thief that he has been sent by customers to fetch away the goods[6] they had bought; or a representation that he wants change for a sovereign, which affords him an opportunity of running off with both the sovereign and the change also[7]. But it is not essential that there should be any such *active* fraud. It is enough if the offender obtains the thing from the owner, fully intending to appropriate it, and knowing at the same

[1] *Reg.* v. *McGrath,* L. R. 1 C. C. R. 205 (K. S. C. 262).

[2] Cf. Ulpian in *Digest,* XLVII. 2. 52. 22.

[3] *Rex* v. *Patch,* 1 Leach 238.

[4] *Reg.* v. *McKale,* L. R. 1 C. C. R. 125; *Reg.* v. *Hollis,* L. R. 12 Q. B. D. 25.

[5] *Rex* v. *Standley,* R. and R. 305.

[6] *Rex* v. *Hench,* R. and R. 163 (K. S. C. 264).

[7] *Rex* v. *Williams,* 6 C. and P. 390 (K. S. C. 265).

time that the owner does not intend him to appropriate it. It is thus abundantly clear that if the owner only consents to give up the mere possession of the thing (*e.g.*, to lend a horse for a ride), the fact that this consent was obtained by fraud will prevent its constituting any defence for the larceny of subsequently appropriating the thing. But if the owner had consented to give up not only his possession but also his property in the thing, then—even though there may have been such fraud as to vitiate the transaction, still more if there were merely the owner's own mistake—may not a valid possession have passed in spite of the error, and a larceny consequently have been rendered impossible? This question was discussed very fully in *Reg.* v. *Middleton*[1]. The facts of that case were, however, peculiar in one respect; inasmuch as it was not in consequence of any inducement on the part of the prisoner that the articles were handed over to him by the owner. A post-office clerk, when about to pay out money to a savings-bank depositor, consulted by mistake the wrong letter of advice; and consequently handed over to the depositor a far larger sum than really stood to his credit. The man took the money, knowing full well that it was paid to him by mistake. On being indicted for larceny, he was convicted; and the conviction was upheld by eleven judges against four. Eight of these eleven judges held that, even here, the clerk's mistake was sufficient to prevent both the property and even the possession from passing[2]; so that the prisoner's taking of the coins was felonious. They insisted that a mere inoperative intention on the part of an owner to pass the property—inoperative in itself, and known to the thief to be inoperative—could not be enough to prevent the

[1] L. R. 2 C. C. R. 38 (K. S. C. 266).

[2] Sir Frederick Pollock thinks this doctrine had already been conclusively established in the earlier case of *Hardman* v. *Booth* (1 H. and C. 803); which, however, was not cited in *Reg.* v. *Middleton*. See Pollock and Wright on Possession, p. 112.

appropriation from constituting a larceny. On the other hand, seven judges thought that an owner's consent to pass not only possession but also property might, even when too defective to pass a perfect title, still suffice to prevent the taking of possession from being a larceny; in spite of there being mistake, or fraud, of such a nature as to prevent the consent from being operative. (But three of these seven, it may be added, upheld nevertheless the conviction of Middleton; on the ground that the full authority of an owner had not been delegated to the post-office clerk.)

It will be noticed that, in this case, the clerk's mistake was an unexpected and purely spontaneous blunder; which the prisoner had done nothing at all to lead him into, though he did knowingly abstain from correcting him.

It is therefore still somewhat uncertain whether, where an owner intends to part with possession *and property*, but does so only in consequence of a spontaneous mistake, which is detected by the taker, the latter is guilty of larceny. A more definite answer can, however, be given to the other question, much more frequently arising in practice, viz., whether, where it is by some active fraud that the owner is thus induced to consent to part with possession and property, such a consent will prevent the taking from constituting a larceny. Our answer must be that if the fraud is merely such as, in property law, gives the alienor only a right to rescind the alienation, and does not prevent a legal ownership (though a merely voidable one) from passing meanwhile to the alienee, then the alienee's crime will not be that of larceny, but only the misdemeanor of obtaining by false pretences[1]. If, however, the fraud related to some circumstance so fundamental that, notwithstanding the owner's intention to alienate, no right of property (not even a voidable one) passed to the author of the fraud, the latter will have committed a larceny. Similarly, there will be a larceny

[1] See below, ch. xv.

if the owner's intention was not to make an immediate and absolute alienation but only a deferred or a conditional one; as where a stranger purports to buy a horse in a fair for ready money, but mounts it and rides off without paying the price[1]. Such a transaction may at first sight seem to resemble the misdemeanor of a fraudulent obtaining of ownership, rather than the felony of larcenously taking away possession from a continuing owner. But the latter view of it has prevailed; for the owner, it is said, must have intended only a conditional alienation, not meaning the property to rest absolutely in the recipient until the price was paid. This argument, however, does of course involve a conjectural assumption as to the owner's state of mind with regard to a contingency that possibly never occurred to his mind at all. A further reason, perhaps more satisfactory, is that inasmuch as there was no *consensus voluntatum*, no "meeting of two minds in one and the same intention[2]"—the prisoner never having any genuine intention to contract—the arrangement (whatever its conditionality or its absoluteness) was wholly void in law, and therefore could confer on the prisoner no rights whatever; though he himself would be "estopped[3]" from asserting its invalidity.

(5) To this discussion of the effect of an owner's consent in giving a "colour of right" and so preventing a taking from being larcenous, we may add that where the taking is by consent of the owner's agent, or apparent agent, as where a cook gives scraps of food to a beggar, the same principles will apply. And a wife will usually have sufficient appearance of being her husband's agent for this purpose[4]. But her

[1] *Reg.* v. *Russett*, L. R. [1892] 2 Q.B. 313 (K. S. C. 349). See also *Reg.* v. *Buckmaster*, L. R. 20 Q. B. D. 182.

[2] Pollock on Contract, p. 2.

[3] Anson on Contracts, Part II. ch. IV. sec. 2. Cf. *Freeman* v. *Cooke*, 2 Ex. 654.

[4] *Rex* v. *Harrison*, Leach 47 (K. S. C. 274).

consent to the taking of his goods is no defence where they are taken by her adulterer[1]. It may reasonably be conjectured that where (as may so readily happen, since the passing of the Married Women's Property Act, 1882) property belongs to a wife, the consent of her husband would similarly be held to afford a sufficient "colour of right" to excuse a taking.

§ 9. The Intent.

We have seen that an intention to deprive the other person of the whole benefit of his title is necessary. Accordingly a mere intention to take away the owner's possession from him temporarily will not suffice[2]; as when a schoolboy takes out of his master's desk a "crib" wherewith to prepare a lesson. Similarly a husband who takes his wife's diary, merely that he may produce it as evidence against her on his petition for a divorce, does not commit a larceny. To seize your debtor's property wrongfully, but merely for the purpose of inconveniencing him by detaining it until he pays your debt, is thus no larceny but only a tort. So again, it is no larceny for the finder of an article to refuse to deliver it up when first asked for, if he is delaying merely in hopes of a reward being offered[3]. To take a key merely for unlocking a safe, even though it be with the object of stealing the contents, is no larceny. And thus a boy may steal a ride without stealing the donkey[4]. He does of course commit a trespass; but he does nothing that amounts, in the law of tort, to a "conversion." Nor will even his turning the animal loose, when he has finished his ride, necessarily constitute a conversion. But if he turned it loose at some place so remote that it would be unable to find its way back to its

[1] *Reg.* v. *Featherstone*, Dearsly 369 (K. S. C. 274).

[2] 2 East P. C. c. 16, s. 98 (K. S. C. 284).

[3] *Reg.* v. *Gardner*, L. and C. 243.

[4] *Rex* v. *Crump*, 1 C. and P. 658 (K. S. C. 284); *Rex* v. *Phillips*, 2 East P. C. c. 16, s. 98.

owner, he would usually be guilty of a conversion, and so of a larceny. Early in Queen Victoria's reign, a slave, escaping from the United States, seized upon a boat and rowed himself out to a British man-of-war. On reaching her he abandoned the boat. The United States government claimed his extradition as a criminal, for the larceny of this boat. But the law officers of the Crown advised that there was no larceny; as the boat was only taken for mere temporary use *fugae causâ*, and with no intent to deprive the owner of it permanently[1]. It may however be doubted whether this advice was not dictated by philanthropic rather than by juridical considerations; a boat being much less likely than a donkey to find its way back to its owner. The same may be said of a bicycle.

It has already been seen that, where goods are bailed, only an act of conversion by the bailee quite inconsistent with the bailment can amount to an appropriation[2]. Equally must there, in the case of all other larcenies, be an intention to appropriate the thing in a manner wholly inconsistent with the rightful possessor's interest in it. (But in them such an intention may be sufficiently manifested by many acts which it would have been quite permissible for a bailee to do, though they show gross dishonesty in the case of anyone who has no right to be in possession of the thing at all.) There is no sufficient appropriation if a servant takes his master's goods merely for the purpose of bringing them back and then defrauding him by a pretence of having meanwhile done work upon them and earned wages thereby[3]. And similarly, it is no larceny for a man, who is only temporarily in need of money, to carry off another person's overcoat and pawn it, with a full intention of redeeming it and returning it, and with a full likelihood of being able to carry out this

[1] Forsyth's *Cases and Opinions in Constitutional Law*, p. 370.

[2] *Supra*, p. 191.

[3] *Reg.* v. *Holloway*, 1 Denison 370 (K. S. C. 285).

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intention. But a man must be taken to intend the natural consequences of his conduct; and therefore if, when he pawned the overcoat, he had not an immediate prospect of being able to redeem it, the mere hope and desire on his part of restoring the coat, if he should ever become able to do so, will not suffice to negative a larcenous intent[1]. An intention of appropriation does not cease to be criminal because the owner is unknown, or even quite untraceable; as when a grave-digger steals brass fittings from very old coffins which he disinters[2].

It should be observed that the mere intention thus to injure the owner suffices, even though the thief have no intention to benefit himself by the theft. It thus is not essential in English law, as it was in Roman law[3], that the theft should be committed *lucri causâ*. Accordingly where the prisoner, in order to put difficulties in the way of the prosecution of a friend of his, who was about to be tried for having stolen a horse, took this horse out of its owner's stables and backed it down a coal-pit, it was held, by the majority of the Court for Crown Cases Reserved, that his act amounted to a larceny[4]. So again where a servant, in order to suppress inquiries as to her character, took a letter and destroyed it, she was convicted of a larceny of it[5]. Similarly if, at the termination of a drunken fight, one of the combatants should, in his ill-temper, pick up the hat which his antagonist has dropped, and fling it into a river, he would commit larceny. Had he, however, flung it merely into a field, there would be no evidence of any intention to deprive the owner of it permanently.

There is, however, one exceptional case in which a thief's intention merely to deprive the owner of his ownership, without any intention of also benefiting himself by his theft,

[1] *Reg.* v. *Trebilcock*, D. and B. 453. [2] *Supra*, p. 196; 2 East P. C. 652.
[3] *Digest*, XLVII. 2. 1. 3; cf. Sandars' note to *Inst.* IV. 1. 1.
[4] *Rex* v. *Cubbage*, R. and R. 292. [5] *Reg.* v. *Jones*, 1 Denison 182.

will not suffice for larceny. For by 26 and 27 Vict. c. 103, (a statute passed in consequence of a case that excited a momentary agitation), it has been made no longer a larceny for servants to give to their master's animals, against his orders, food that belongs to him; and it is, instead, made a petty offence, (punishable, on summary conviction, with imprisonment for not more than three months, with or without hard labour, or a fine of not more than £5).

By far the most difficult question that arises in respect of the *animus furandi* is that of Time. At what moment must the guilty intention exist, in order to render an appropriation larcenous? The answer must differ, accordingly as the accused person's original possession was a lawful one or not. If it were lawful, then no dishonest intention that arises only subsequently can amount at common law to a larceny[1]; (but it has, as we have seen[2], been provided by a modern statute that bailees—though their original taking of possession is of course a lawful one—may be convicted of larceny if they, however long after receiving possession, convert to their own use the article bailed).

If, however, the original taking of possession were in any way unlawful, then any subsequent determination to appropriate the thing will operate retrospectively, and will convert that taking into a larceny. Even if the original taking were no more than a trespass (*e.g.*, taking the wrong umbrella by mistake, or borrowing a neighbour's plough for an afternoon's work without his leave), a subsequent intent to appropriate the thing so taken will thus relate back, and render the act a larceny. Thus where the prisoner drove off amongst his own lambs a lamb of the prosecutor's by mistake, but, after he had discovered the error, proceeded to sell the lamb, he was convicted of larceny[3].

[1] *Rex* v. *Holloway*, 5 C. and P. 525 (K. S. C. 288).
[2] *Supra*, p. 189.
[3] *Reg.* v. *Riley*, Dearsly 149 (K. S. C. 289).

Let us apply these two principles to the very common case of the finding of lost articles[1]. If the owner has intentionally abandoned all right to them, of course the finder may appropriate them, and thereby become true owner[2]. But even where there has been no such abandonment, and consequently the finder does not become owner of the thing which he has found, he will not commit any crime by appropriating it, unless, at the very time of the finding, he both

(i) believed

(*a*) that the owner could be discovered, and

(*β*) that that owner had not intentionally abandoned the thing[3],

and also (ii) forthwith resolved, notwithstanding, to appropriate it.

In determining whether or not a finder has had reasonable grounds to believe that the owner could be discovered, it will be important to take into account the place where the thing was found, and also its own nature, and, again, the value of any identificatory marks upon it. Thus in the case of cheques, bills of exchange, promissory notes, and other securities that carry the owner's name upon them, a finder could scarcely think it impossible to trace out the owner, even though it were in a crowded thoroughfare that he picked up the papers. Similarly in the case of articles left in a cab, the driver will generally have a clue to the owner from knowing where he picked up, or set down, his passengers[4]. And where property has been left by a passenger in a railway train, it has always been held to be larceny for a servant of the railway company to appropriate it instead of taking it to the lost-property office[5].

[1] See Pollock and Wright on Possession, pp. 171—187.

[2] *Supra*, p. 192.

[3] *Reg.* v. *Thurborn*, 1 Denison 387 (K. S. C. 276); *Reg.* v. *Peters*, 1 C. and K. 245 (K. S. C. 279).

[4] 2 East P. C. 664. *Supra*, p. 186.

[5] Cf. *Reg.* v. *Pierce*, 6 Cox 117.

Every finder, it has always been clearly held, has a "special property," *i.e.*, a right to possession; so that he could maintain against any stranger the old actions of trover, detinue, or trespass[1]. But it must be noted that he has not —as some bailees have—a right of possession against the owner himself. The owner remains all the while in "constructive possession" of the article; and hence, if any third person should dishonestly take it from the finder, that person may be treated as having stolen it from the owner[2].

Cases of finding present, however, much less difficulty than those of mutual error, *i.e.*, where a wrong article has been both given, and accepted, in mistake for something else which both parties believed they were dealing with. Simple as is our twofold rule as to the time of the *animus furandi*, it is not easy to apply it in these cases; because of the difficulty of deciding which was the moment when, in contemplation of law, the technical possession shifted, and the thing accordingly was "taken[3]." When walking together in the evening, *A* asks *B* to lend him a shilling; and *B* gives him a coin which both of them, owing to the darkness, suppose to be a shilling. But, after they have separated, *A* discovers the coin to be a sovereign; and thereupon resolves nevertheless to spend it. When, in point of law, did *A* "take" this sovereign into his possession? If it were when the coin was actually handed to him, then (as he had at that time no guilty intent) he "took" it innocently; and therefore no subsequent appropriation of it can make him guilty of larceny. But, on the other hand, if the law does not regard him as having taken possession of it until he came really to know what it was, then (as he simultaneously formed the intention of appropriating it) he will be guilty of larceny. The whole question therefore resolves itself into

[1] Pollock and Wright on Possession, p. 187.

[2] *Reg.* v. *Swinson*, C. C. C. Sess. Pap. cxxxi. 182. *Infra*, p. 223.

[3] See Pollock and Wright on Possession, pp. 205—212.

this, What mental element is necessary for legal possession? "Delivery and receipt," said Lord Coleridge, C.J., "are acts into which mental intention enters. There is not in law, any more than in common sense, a delivery and receipt, unless the giver and receiver intend respectively to give and to receive what *is* given and received." Yet there still remains difficulty in determining what precise extent of concurrence between their intention and the facts is necessary. Thus in *Ashwell's Case* (where the circumstances which we have above described arose) although all the fourteen judges were agreed[1] in adhering to the rule that "if the original taking is innocent, no subsequent appropriation can be a crime," yet seven of them were for upholding his conviction for larceny, whilst seven were for quashing it[2]. In the similar and later case of *Reg.* v. *Hehir*[3] the Irish Court for Crown Cases Reserved was divided almost equally closely; four judges being in favour of the conviction, but the remaining five in favour of quashing it. It must be noted that in both these difficult cases the mutual error went so far as to be a mistake about even the species of the article, and not merely about its marketable value. Had the error concerned value alone, it certainly would not have prevented the possession from passing at the moment of the physical delivery. As was said by Madden, J.[4]:—"*A* may deliver to *B*, in discharge of a trifling obligation, an old battered copy of Shakspeare printed in 1623; both innocently believing at the time that—being old, full of errors and misprints, and badly spelled—it would only fetch a couple of shillings at an auction. Suppose *B* then to sell it to a collector for several hundreds of pounds,

[1] As was expressly announced in the subsequent case of *Reg.* v. *Flowers*, L.R. 16 Q. B. D. 643.

[2] L. R. 16 Q. B. D. 190 (K. S. C. 292). The rule of the Court being 'praesumitur pro negante,' the conviction stood affirmed.

[3] Irish L. R. [1895] 2 Q. B. 709 (K. S. C. 300).

[4] *Reg.* v. *Hehir* (K. S. C. at p. 301).

and to appropriate the proceeds, he would not be guilty of larceny; inasmuch as there was an intelligent delivery of the chattel itself, though there was a mistake as to its value." But in the view of those judges who upheld the convictions of Ashwell and Hehir a mistake as to the species of a coin is not a question of mere value but one of identity. Now in contracts for the sale of chattels, any mistake of identity undoubtedly avoids the contract; since there is no *consensus ad idem*, and therefore[1] the property does not pass. Yet even then it does not follow that legal possession may not pass. True, there are two civil cases[2] in which it was held that the delivery of a bureau (whether on sale or on bailment) is *not* a delivery of its unknown contents (*e.g.*, money lying in some secret drawer); and accordingly that these are not "received" by the holder until he knows of their existence. These cases go so far as to shew that a person does not always "receive" a thing by its merely coming into his physical possession. But, inasmuch as the parties dealing with the bureaux were ignorant of the very existence of the money, these cases fall short of *Ashwell's Case*, where both parties quite knew that it was with a coin that they were dealing.

We therefore can only say that if a chattel is given and received "intelligently," the possession will certainly pass; and beyond this, we must not go. For it is not yet possible to lay down authoritatively *what* exactly it is that must be correctly understood by the parties[3].

[1] *Raffles* v. *Wichelhaus*, 2 Hurlstone and Coltman 906.

[2] *Cartwright* v. *Green*, 8 Vesey 405; *Merry* v. *Green*, 7 M. and W. 623.

[3] In *Reg.* v. *Ashwell* those who maintained that knowledge of the true nature of the thing was essential also held that the taker had at first merely an excusable "detention"; and accordingly, if he had paid away the coin before discovering its nature, he would have been protected from any claim by the owner for its proper value. But an intermediate view has since been suggested by Mr Justice Wright (*Possession*, p. 210; cf. p. 105), viz., that the mistake did not thus invalidate the acceptance, but that it did invalidate the delivery; so that, though a new (and an excusable) possession did arise, it was a trespassory one, and accordingly the subsequent *animus furandi* related back and made the taker guilty of larceny.

Where the mutual mistake relates to the person for whom a letter is intended, it has more than once been held[1] that if a postman mis-delivers a letter, and then the recipient, on opening it and finding it not to be meant for him, nevertheless appropriates some article which was enclosed in it, he commits no larceny. For there was no *animus furandi* at the time when the letter came into his hands; and the delivery of a letter, unlike that of a bureau, clearly is always intended to include delivery of all its contents. Thus in a recent case a letter addressed to a Mrs Fisher in one house was delivered to a Mr Fish living in another; and, on opening it, he found that it contained a cheque. This he proceeded to endorse (in the name of Fisher) and to cash. On an indictment for stealing this cheque, he was acquitted; the court holding that the legal "receipt" both of the letter and of the cheque took place at the actual moment when the envelope reached Fish, although he did not then detect the mistake of name[2].

§ 10. THE PUNISHMENT.

As regarded its punishment, larceny presented some anomaly at common law; for, though a felony, it was not invariably a capital offence[3]. A distinction was made, according to the pecuniary value of the thing stolen. If it were worth only twelve pence or less, the offence was merely a "Petty" larceny; and, although a felony, was not punishable with death. If the thing were worth more than 12*d.* the crime was a "Grand" larceny; and at least as early as the

[1] *Rex* v. *Mucklow*, Moody 160; *Reg.* v. *Davies*, Dearsly 640; see Pollock and Wright on Possession, p. 113, as to the authority of these cases being still maintainable, whatever view be taken of the recent conflict of opinion in *Reg.* v. *Ashwell*.

[2] C. C. C. Sess. Pap. cxxxi. 212. Fish might, however, have been indicted under 7 Wm. IV. c. 36, s. 31, for the statutory misdemeanor of "fraudulently retaining a post-letter which ought to have been delivered to some other person."

[3] *Supra*, p. 93.

time of Edward I.—probably indeed by the legislation of the stern "Lion of Justice," Henry I.[1]—it became punishable capitally. The phrases "Petty" and "Grand" have become obsolete since the abolition in 1827 of the distinction between them[2]. But larceny still admits of a division into two forms; the Simple and the Aggravated.

Simple larceny—namely such as is merely what we originally defined larceny to be, and is unaccompanied with any of certain specified circumstances of aggravation—is punishable either with penal servitude for not more than five years or less than three, or with not more than two years' imprisonment with or without hard labour[3]. If convicted on an indictment, the offender cannot be fined; but upon summary conviction by justices of the peace, he may be fined. A person convicted of simple larceny, after having been previously convicted of any felony whatever, may be sentenced to ten years' penal servitude[4].

Aggravated larceny is of various kinds; punishable by various long periods of penal servitude, ranging from the offender's life down to seven years. The circumstances by which larceny may be aggravated are of four species.

(1) The place where it is committed; *e.g.*, a ship[5], dock[5], wharf[5], or wreck[6], or (if the stolen property be worth not less than £5) a dwelling-house[7]. The maximum punishment in each of these five cases is fourteen years' penal servitude.

(2) The manner in which it is committed; *e.g.*, by stealing from the person[8]. If the property is not only taken from the person of someone but taken from him by force, or if he is led to give it up by being put in fear of force being used, the offence obtains the name of Robbery[9]. But obtaining

[1] Freeman's *Norman Conquest*, v. 158; Lingard's *Hist. Eng.* II. 207; Pollock and Maitland, II. 496.

[2] 7 and 8 Geo. IV. c. 29, s. 2.

[3] 24 and 25 Vict. c. 96, s. 4; 54 and 55 Vict. c. 69, s. 1.

[4] 24 and 25 Vict. c. 96, s. 7.

[5] *Ibid.* s. 63.

[6] *Ibid.* s. 64.

[7] *Ibid.* s. 63.

[8] *Ibid.* s. 40.

[9] *Ibid.* s. 40.

money from a solitary woman in a lonely place by a threat, not to use force, but merely to accuse her of being there for evil purposes, would not be robbery; though it would, as we shall shortly see, constitute a statutory felony[1]. And even actual force, if it does not begin until after the taking, will not make a larceny become a robbery.

The maximum punishment of these offences is again fourteen years' penal servitude. But for robberies that are further aggravated in certain specified ways, (as by the robber's being armed, or having a companion, or actually committing an assault), the maximum punishment rises to penal servitude for life[2]; and the well-known Garrotters' Act, 1863[3] makes it possible to add flogging, unless the offender be a woman. Even if no article be actually taken, and so no robbery be effected, the mere assault with intent to rob is a felony, and punishable with five years' penal servitude[4]; and, similarly, demanding a thing by menaces with the intent to steal it—though there be no assault and the menaces do not relate to physical violence—is a felony incurring the same punishment[5].

(3) The person by whom it is committed. For a larceny by a clerk or servant, the maximum punishment is raised to fourteen years' penal servitude[6], owing to the opportunities of dishonesty which are necessarily placed within the reach of all persons thus employed, and to the breach of trust which is involved in taking advantage of them. The discussion of the difficult question "Who is a clerk or servant?" may be deferred until the subject of Embezzlement is dealt with[7].

(4) The subject-matter which is stolen. Thus the larceny of cattle[8], or of ten shillings' worth of textile goods

[1] 24 and 25 Vict. c. 96, s. 45.
[2] *Ibid.* s. 43.
[3] 26 and 27 Vict. c. 44.
[4] 24 and 25 Vict. c. 96, s. 42.
[5] *Ibid.* s. 45.
[6] *Ibid.* s. 67.
[7] *Infra*, ch. XIV.
[8] 24 and 25 Vict. c. 96, ss. 10, 11.

exposed in process of manufacture[1], is punishable with penal servitude for fourteen years. (But maliciously destroying such textile goods is punishable with penal servitude for life[2].) Again, for stealing letters from a post-office, or from a postman, the maximum punishment is penal servitude for life[3]. And yet, curiously enough, a more complex and apparently more heinous offence, viz., the stealing of a post-letter by a person who is himself an employé of the post office, is punishable only with seven years' penal servitude[4]; (unless the letter contained some chattel or money or valuable security, in which case the maximum punishment is penal servitude for life)

§ 11. Quasi-Larcenies.

In the course of the foregoing account of larceny we have had occasion to mention various articles which, though movable, do not come within the law of larceny. It is important to add that by various modern statutes which are now consolidated in the Larceny Act, 1861, it has been made a crime to steal almost any of these[5]. But such thefts are not[6] made "larcenies"; and some of them are not even made felonies, but only indictable misdemeanors or offences punishable on summary conviction. Hence, even where one of such offences is made a felony, if a person indicted for it were to be convicted of larceny, the conviction would be bad. Yet such thefts are construed by all the other common law rules about larceny, *e.g.*, rules as to what will constitute a taking or a carrying away, or an intent to steal. It may consequently be convenient if, for want of any recognised name, we call them "Quasi-Larcenies."

[1] 24 and 25 Vict. c. 96, s. 62.

[2] 24 and 25 Vict. c. 97, s. 14.

[3] 1 Vict. c. 36, s. 28.

[4] *Ibid.* s. 26. This lessening of punishment was perhaps due to the influence of the ancient rule that mere embezzlement was no crime.

[5] See Stephen, *Dig. Cr. Law*, Arts. 347—354.

[6] See 7 C. and P. 667 *n.*; cf. 8 C. and P. 294. The headings adopted in the Larceny Act, 1861, suggest that the draftsman was not clear about this.

The cases of hares, and of fish, have already been mentioned. We may add some still more common instances.

(1) The theft of any valuable security[1] is a felony, and punishable in the same manner as if the thief had stolen a chattel of like value.

(2) To steal trees of the value of £1[2] or more, if growing in a pleasure ground, or to steal any fixtures[3] or title-deeds[4], is a felony punishable (like simple larceny), with five years' penal servitude.

(3) To steal wild deer in *inclosed* land, and to steal mineral ore[5], are felonies, but punishable with no higher penalty than two years' imprisonment, with or without hard labour.

(4) And it is a petty offence punishable, on summary conviction, with (for a *first* commission of the crime) six months' imprisonment with or without hard labour, to steal any plant, fruit or other vegetable production growing in a garden[6], or to steal a dog[7], or indeed to steal any bird, beast or other animal which has been ordinarily kept in confinement (*e.g.*, a canary) or for any domestic purpose (*e.g.*, a cat) and is not larcenable at common law[8].

§ 12. Restitution of Possession.

The only remaining topic to be considered in connexion with larceny, is that of the Restitution of the stolen property. The thief, as we have said, aims at depriving the true owner of all the benefits of his ownership. But of the ownership itself he cannot deprive him. It is important for the student to avoid the misapprehensions on this point which are apt to arise from the ambiguity of the word "property." That term may mean[9] either the physical object which is owned (*e.g.*, "This

[1] 24 and 25 Vict. c. 96, s. 27. [2] *Ibid.* s. 32. [3] *Ibid.* s. 31.
[4] *Ibid.* s. 28. [5] *Ibid.* s. 18, and s. 38. [6] *Ibid.* s. 36.
[7] *Ibid.* s. 18. [8] *Ibid.* s. 21.
[9] Austin's *Jurisprudence*, Lect. XLVII.

umbrella is part of my *property*"), or the legal right which the owner has over it (*e.g.*, "The finder of a lost umbrella acquires a special *property* in it"). It is only in the former sense that we can ever speak of "lost property" or of "stolen property." For property in the second sense (*i.e.*, the intangible right of ownership) cannot be stolen or mislaid. A theft, then, leaves unaltered the ownership in the goods stolen[1]; so that the owner is still entitled to seize upon the thing, or to bring a civil action to recover it from the thief. There is an apparent exception to this where the thief has gone on to destroy the thing, or even to irrecoverably alter its essence by making an entirely new kind of thing out of it. In the latter case, as when *A* takes *B*'s barley and makes it into malt, or *B*'s planks and builds a summer-house with them, he acquires title, by *Specificatio*[2], in the new thing thus created. For, just as if *A* had burned the planks, or had fed pigs with the barley, *B*'s ownership is utterly gone[3]; and, consequently, his civil remedy is an action for damages alone. Yet even here there is no real exception to the principle we laid down. For it was not by the theft, but by further conduct, posterior to the theft, that *B*'s ownership was extinguished[4].

[1] It is usually said that even the *possession* remains, constructively, in the owner (1 Hale P. C. 507); but see Pollock and Wright, p. 157 as to whether this should not be understood only as the *right to* possession.

[2] See Justinian, *Inst.* II. 1. 25—29. [3] Y. B. 5 Hen. VII. fo. 15, pl. 6.

[4] If *A* had dealt with the materials in a less trenchant manner, so that the law would regard their identity as still continuing and as being still traceable—as where leather is made into shoes, cloth into a dress, or a log into planks (*Betts* v. *Lee*, 5 Johnson, New Yk. 348)—ownership would not have been changed; and *B* might lawfully have seized the whole of the manufactured product.

Indeed, *A*'s misconduct will sometimes have even the result of actually enriching *B*. For if, by a *Confusio*, *A* mingles *B*'s goods with his own, and not in a mere separable combination (like a heap of chairs) but so as to become mixed undistinguishably (as in a heap of corn or a stack of hay), then the law confers upon *B* the ownership of the whole mass. *B* therefore becomes entitled to carry off even that part which, before the theft, did not belong to him at all (Popham 38, Cro. Jac. 366). Similarly, in *Accessio*, if

Since a thief does not become owner, he cannot confer ownership upon anyone else; for *non dat qui non habet.* Hence the original owner may sue the thief, or anyone to whom the thief has given or sold the stolen article, in a civil action to recover it or its value. Moreover, to save owners the trouble and expense of this fresh litigation, it has been enacted that an order for restitution[1] of stolen property may be made by the Criminal Court (even though it be a court of mere summary jurisdiction) before which any person is convicted under the Larceny Act, 1861, of larceny (whether simple or aggravated) or embezzlement or theft in any form, or even false pretences. But it can only cover such stolen property as has been mentioned in the indictment and has been produced and identified at the trial.

But it must now be added that upon this general principle, *Non dat qui non habet,* the common law soon engrafted two exceptions, which the necessities of trade had shewn to be indispensable for the security of purchasers[2]. One depends upon a peculiarity in the stolen property itself; the other upon a peculiarity in the place where the purchaser buys it. A man who, in all ignorance of the theft, gives the thief valuable consideration in exchange for the stolen property, may, in spite of its having been stolen, acquire a good title to it, if either (i) this stolen property consisted of money or of a negotiable security, or if (ii) it was transferred to him in a "market overt."

A take *B*'s dressing-gown and embroider it with his own thread, *B*, as owner of the "principal," can retake the garment and, along with it, the "accessory" embroidery (1 Hale P. C. 513). Nor does the English law require him in any of these cases to pay any compensation for the advantage he obtains; though the Roman did.

It should be added, however, that in those cases of *Confusio* where the commingled articles are identical not only in kind but even in mere quality and value, it is doubtful whether the general rule would not be modified, by making *A* and *B* joint owners of the total mass (see 15 Vesey 442).

[1] 24 and 25 Vict. c. 96, s. 100.

[2] Williams' *Personal Property*, Part IV. p. 518.

(i) To secure the free circulation of current coin, the law treats as indefeasible the title to money which has been paid away for value to an innocent recipient[1]; and this, even though the particular coins may be still identifiable. Yet even money can be claimed back by its original owner from a beggar to whom the thief has generously flung it; or from a companion to whom he has paid it in discharge of a bet; or, again, from shopkeepers who have sold goods to him for it, but in full knowledge that he had no lawful right to the coins he was paying them. And it has recently been held that if the coins were dealt with, not as currency but, as chattels, the privilege does not apply. Thus, where a stolen Jubilee £5 piece had been acquired, by an innocent purchaser for value, as a curiosity, the original owner was held to be entitled to recover it or its worth[2]. The distinction is perhaps to be regretted; as making a *bonâ fide* receiver's title depend upon a question so uncertain, even possibly to himself, as that of his intentions about his future treatment of the coin.

When modern commercial law introduced a paper currency, in the shape of bills of exchange and promissory notes, the privileges of money were (under similar restrictions) conferred on them. This privilege it is, which renders them not merely "assignable" but "negotiable[3]."

(ii) Fairs and markets, moreover, brought together men from places so distant that, in mediæval days, the purchaser had little means of knowledge about the vendor he dealt with there, and consequently he needed the protection of some legal privilege[4]. Hence it became settled that even the most ordinary chattels might be effectually alienated by a mere thief, if he sold them for value to a *bonâ fide* pur-

[1] Williams' *Personal Property*, Part IV. p. 519.

[2] *Moss* v. *Hancock*, L. R. [1899] 2 Q. B. 110.

[3] Anson on Contracts, Part III. ch. II. § 1.

[4] Cf. Pollock and Maitland, II. 154, 164; Reeves' *History of English Law* (ed. Finlason), III. 331.

chaser on a market day, in such a place as was a lawfully established market for the particular kind of goods concerned —*e.g.*, cattle, or corn, or cloth. And the publicity and rarity of the privileged occasions made this exceptional rule work comparatively little injury in the way of encouraging thieves. But modern facilities of intercourse have lessened the need for this protection; and, accordingly, modern legislation has restricted its completeness. For now, even when the original ownership has been divested by a sale in market overt, it will be revested in the old proprietor if the thief, or guilty receiver, be convicted of the stealing or receiving[1]; a rule intended to stimulate owners to activity in prosecuting. (The court which convicts may itself issue an order for restitution, and so save the trouble of a civil action. Such an order does not create any new right; the mere conviction has upset the effect of the sale in market overt[2].) But a conviction does not revest the ownership retrospectively. Accordingly, though the present holder must give up the article to the old owner, yet if the former were not the original purchaser in market overt, the owner will have no right of action in "trover" against that original purchaser, or against any intermediate holders.

Formerly a conviction for almost any felony or misdemeanor under the Larceny Act would produce this revesting. But now by the Sale of Goods Act, 1893[3], goods in which an actual ownership has been obtained by false pretences do not revest in the owner, upon a conviction of the offender; still less are intermediate sales of such goods (whether in or even out of market overt) affected by the conviction.

Hence after a conviction for larceny (but usually not after one for false pretences) the owner is sure to be able to sue for restitution, except in the case of money or a negoti-

[1] 24 and 25 Vict. c. 96, s. 100.

[2] *Scattergood* v. *Sylvester*, 15 Q. B. 506. *Infra*, p. 251.

[3] 56 and 57 Vict. c. 71, s. 24.

able security. And even in this excepted case, if the thief has spent the proceeds of the theft in buying some article, the owner of the money may seize that article, and the thief cannot recover it from him[1]. Thus the owner may "follow his money" even into the subsequently purchased goods which represent it; for in the Larceny Act[2] the word "property" includes not only the property originally possessed, but also any property into or for which it has been converted or exchanged. An innocent purchaser, against whom a restitution order is made, may ask the court to compensate him by returning him, out of any moneys that have been taken from the prisoner on his apprehension, the amount of the price which he had paid[3].

It will be seen that the rules which we have explained do not include any provisions for cases (1) where a thief, though really guilty, has been acquitted, or (2) where other property has been stolen besides the articles specified in the indictment, or (3) where stolen property has been recovered by the police, but the thief has not been arrested. Accordingly the Police Property Act, 1897 (60 and 61 Vict. c. 30) has given more extensive powers; by enabling Courts of Summary Jurisdiction to order the delivery of any property, which has come into the possession of the police "in connexion with any criminal charge," to anyone who appears to be the owner. After six months from the date of such an order, this person will become indefeasible owner.

[1] *Cattley* v. *Loundes*, 2 T. L. R. 136. Cf. L. R. 17 Q. B. D. at p. 601.
[2] 24 and 25 Vict. c. 96, s. 1. [3] 30 and 31 Vict. c. 35.

CHAPTER XIV.

EMBEZZLEMENT.

As early as 1529 (21 Hen. VIII. c. 7) the criminal liability of servants[1] was extended to cases in which their master had delivered (not into their mere custody but) into their full "legal" possession any valuable goods to be kept by them as bailees for him. The "imbezilment" of such goods by them was made a felony. But where goods were received by a servant into his legal possession on his master's account, not from that master himself but from some third person, who wished to transfer the possession of them (whether with or without the ownership) to the master, the statute did not apply. In such a case the deliveror has ceased to have any possession of the goods; while, on the other hand, they have not yet reached the possession of the master; and they thus are for the time being in the servant's own possession. There they will continue until he either actually delivers them to his master, or constructively does so by consenting to hold them as a mere "custodian." Until then, he accordingly cannot commit larceny of them. (Yet, somewhat inconsistently, it is held by our civil courts that this delivery to a servant, by a stranger, gives the master such a possession as entitles him to sue anyone for damages who commits a trespass to the goods, even whilst they are still in the servant's hands[2].) Accordingly if a bank cashier, on receiving money at the counter, does not put it into the till, but pockets it

[1] *Supra*, p. 188. See Stephen, *Dig. Cr. Law*, Arts. 335—8.
[2] Pollock and Wright on Possession, 130; 1 Hale P. C. 668.

and uses it for his own purposes, he commits no larceny. It had not reached the possession of the bankers; he therefore cannot legally be said to have "taken" it from them. Such a doctrine exposes employers to risks so great that immediately upon its definite establishment by the case of *Rex* v. *Baseley*[1], in 1799, Parliament took action. A statute[2] was passed, which made it felony for any servant or clerk to embezzle money or goods thus received into his possession for his employer, although they had not reached the employer's own actual possession. (The words *embezzle* (or *imbezil*) and *bezzle* had been in use since at least the fourteenth century, as meaning "to make away with," usually connoting some degree of clandestinity[3].) The enactment now in force as to this crime[4] provides that:—

"Whosoever, being a clerk or servant (or being employed for the purpose, or in the capacity, of a clerk or servant) shall fraudulently embezzle any chattel, money, or valuable security, which shall be......taken into possession by him for, or in the name, or on the account of, his master or employer ......shall be deemed to have feloniously stolen the same from his master or employer; although such chattel, money, or security, was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed."

As he occupies a fiduciary position, he is liable to a higher punishment than that of simple larceny. He may be sentenced to penal servitude for any term not exceeding fourteen years and not less than three years; or to be

[1] Leach 973 (K. S. C. 305).

[2] 39 Geo. III. c. 85. Stephen, *Hist. Cr. Law*, III. 152.

[3] The derivation is uncertain. Professor Skeat suggests a connexion with *imbecile*, and the idea of diminishing by a purloining; but Dr Murray traces it to the French *besillier*, to ravage. The legal use of the term is almost exclusively limited, at the present day, to the statutory felony explained on this page.

[4] 24 and 25 Vict. c. 96, s. 68.

imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and—if a male under the age of sixteen years—with or without whipping.

The crime of Embezzlement presents three points for our consideration:—(1) the persons who can commit the offence; (2) the property on which it can be committed; and (3) the mode of commission.

(1) As to the first of these, the question, Who is a clerk or a servant?—the latter term here including the former—often presents great difficulty in practice. If *A* is employed by *B* to do work for him, he is not necessarily *B*'s servant, but may be merely an agent, an "independent contractor[1]." He will not be a "servant" unless the agreement, between himself and *B*, puts him so completely under *B*'s control that he must obey all lawful orders that *B* may give him in connexion with the employment[2]; *i.e.*, *B* can tell him not only what to do, but even how to do it. To ascertain whether or not the contract between the parties did create so complete a control, we must first inquire if its terms were embodied in a written document. If they were, it will be for the court to determine whether or not they established this full control. But if the contract was an oral one, then it is by the jury that the question must be determined[3]. In determining it, they may have to take into consideration a variety of points, no one of which is of itself absolutely conclusive. Something will depend on (*a*) the nature of the employment; thus a commercial traveller usually is a servant, whilst an insurance collector or a debt collector[4] usually is not. Again, it is important to notice (*b*) the amount of time which it was agreed should be devoted to the employment. That *A* was to give the whole of his time to *B* is strong

[1] Cf. Pollock on Torts, ch. III. § 3.

[2] *Reg.* v. *Negus*, L. R. 2 C. C. R. 34 (K. S. C. 306).

[3] *Ibid.*

[4] *Reg.* v. *Hale*, 13 Cox 49.

evidence of his being a servant[1], though it is not conclusive. Yet, on the other hand, it is not essential; for a true servant may also work for himself, or even for other masters[2]. He may even have been employed by the prosecutor for merely one solitary transaction; and, indeed, in principle, the relationship of master and servant is merely one of present fact, and may exist where there is no contract binding the servant to go on serving any longer than he likes[3]. Another matter to be taken into consideration is (c) the mode of payment. A periodical salary or wage is some evidence of the recipient's being a servant[4]; hence it is common for societies to pay their treasurers a nominal yearly sum, such as a shilling, to secure the protection of the law of embezzlement. Conversely, payment by commission, or by share of profits, tends to disprove the existence of any such relation as that of master and servant. But neither fact is at all conclusive.

(2) Passing to the property concerned, we must notice that the statute[5] limits the offence to the appropriation of such articles as have been received by the prisoner "for, or in the name, or on the account of, his master or employer." Thus a servant can commit an embezzlement only of things that he has received as servant. A shopman who sells such goods as he is authorised to sell—or a workman who executes for his master's customer, and with his master's tools, work which he is authorised to execute and receive payment for—will be guilty of embezzlement if he appropriates the money paid by the customer[6]. But a servant cannot embezzle anything which he obtained by doing an act that was outside his authority. Hence if a gentleman's coachman takes it on himself to ply for hire with his master's carriage, and spends

[1] *Reg.* v. *Bailey*, 12 Cox 56.
[2] *Reg.* v. *Tite*, L. and C. 29.
[3] *Reg.* v. *Foulkes*, L. R. 2 C. C. R. 150 (K. S. C. 309).
[4] *Reg.* v. *Negus*, loc. cit.
[5] 24 and 25 Vict. c. 96, s. 68.
[6] *Rex* v. *Hoggins*, R. and R. 145 (K. S. C. 314).

in drink the coins so earned, he does not commit embezzlement of them[1]. Or if a woman, employed in a shop only to act as cashier, should take it upon herself to sell ribbons at the counter, and should appropriate the prices paid to her for them, she will not be guilty of any embezzlement of the money; (though she will have committed a larceny of the ribbons themselves[2]). Similarly it has been held that if a servant forges a cheque in the name of his master, and cashes it, he does not receive the coins in his capacity of servant, and therefore does not commit embezzlement by making off with them[3]. But it would, of course, be embezzlement, to appropriate money which he had obtained by cashing any cheque that had been sent to him on his master's account; even though it had been made out to the prisoner himself as payee[4].

A servant, as we have already said, can only "embezzle" what he has received *for* his master. It is not an embezzlement, but a larceny, for him to appropriate money which he has received *from* his master; and this even though it did not come to him from the master directly, but only through the hands of some fellow-servant[5]. Yet if, through the same fellow-servant, he had received money remitted for their master by some stranger, he can commit embezzlement of this money; for it had not yet reached the master's possession, but was stopped by him whilst still on its way to the master[6]. But if once he had put this money into his master's till[7], his subsequently taking it out again and appropriating it would be a larceny and not an embezzlement. So would the conduct of a carter who should remove a load of straw after

[1] *Per* Blackburn, J., in *Reg.* v. *Cullum*, L. R. 2 C. C. R. 28 (K. S. C. 311).
[2] *Reg.* v. *Wilson*, 9 C. and P. 27 (K. S. C. 313).
[3] *Reg.* v. *Aitken*, C. C. C. Sess. Pap. xcvii. 336 (K. S. C. 315).
[4] *Reg.* v. *Gale*, L. R. 2 Q. B. D. 141 (K. S. C. 316).
[5] *Reg.* v. *Murray*, 1 Moody 276 (K. S. C. 318).
[6] *Reg.* v. *Masters*, 1 Denison 332 (K. S. C. 319).
[7] Cf. *Reg.* v. *Sullens*, 1 Moody 129 (K. S. C. 320).

once he had delivered it on his master's premises; and this, even though the place where he had so delivered it was not its proper and final destination[1].

These illustrations shew vividly how fine a line often has to be drawn in determining whether it is a larceny or an embezzlement that a servant has been guilty of. The doctrine of possession is so subtle and technical that it frequently is hard to say for which of the two offences a man should be indicted; and failures of justice used often to arise in consequence. Fortunately, however, they have been rendered rarer by a statute passed in 1851[2], which has removed the absolute necessity of accuracy on this point, so far as the indictment is concerned; by providing that if, on a charge of larceny, the crime committed prove to have been an embezzlement (or *vice versâ*), the jury may convict of the crime actually proved, instead of the crime originally charged. But it may be hard to say which *was* proved.

(3) Turning to the mode of committing the offence, we must note that, as embezzlement is committed without any change of possession, the fact of an appropriation is often hard to prove. It may be shewn by absconding with the money[3], or by denials of having ever received it[4], or by any really wilful omission to pay it over[5]. But the mere fact of omission, as it may have been due to pure carelessness, does not suffice to shew an appropriation[6]. Still less does the mere fact of there being a deficiency in the servant's accounts; *i.e.*, his not having actually credited to himself, in his books, disbursements sufficient to exhaust all the cash he has received. For he may merely have lost it by negligence; and negligence, however gross, is not a criminal

[1] *Reg.* v. *Hayward*, 1 C. and K. 518 (K. S. C. 321).
[2] Now replaced by 24 and 25 Vict. c. 96, s. 72. *Infra*, Book IV.
[3] *Rex* v. *Williams*, 7 C. and P. 338 (K. S. C. 322).
[4] *Rex* v. *Jones*, 7 C. and P. 833 (K. S. C. 322).
[5] *Reg.* v. *Jackson*, 1 C. and K. 384.
[6] *Rex* v. *Jones*.

dishonesty. And even if he has spent it, there is nothing to shew that he did not spend it on his master's account. Moreover, when it is proved that there must have been some really dishonest appropriation, this proof will not be enough so long as the theft is only shewn to have produced a "general deficiency." There must further be evidence that the particular amount specified in the indictment was appropriated, and at the particular date and place also there specified[1]. For otherwise the prisoner would have no means of securing himself the protection of the plea of *autrefois convict* or *autrefois acquit*[2], in case of his being prosecuted a second time for this same charge.

It is easy to understand that dishonest clerks often escape[3] on indictments for embezzlement, because of the difficulty of thus proving an actual appropriation; even where it is clear that money has been received by them, and detained, without their making any entry or other acknowledgment of the receipt. Hence in 1875, by a measure introduced by Sir John Lubbock but commonly known as Lopes' Act[4], it was made a misdemeanor, punishable with seven years' penal servitude, for a clerk or servant "wilfully, and with intent to defraud, to alter, or make a false entry in, or omit a material particular from, any account of his master's." An indictment for this offence of false accounting is often useful where a clerk to whom a customer has paid money is suspected of stealing it, but no more can be actually proved than that he has never credited the customer with the amount. If, however, his books do shew correctly the sum which he ought to have in hand, the fact of his not really having that amount, ready to hand over, does not render the entry a "false" one within this statute.

[1] *Reg.* v. *Chapman*, 1 C. and K. 119.
[2] *Infra*, Book IV.
[3] Stephen, *Hist. Cr. Law*, III. 186.
[4] 38 Vict. c. 24.

Servants and clerks are far from being the only persons whose fiduciary position gives them opportunities for committing acts of dishonesty which, in the common law, were treated as deprived of legal criminality by those very circumstances of trust which aggravate their moral heinousness. We have already alluded[1] to the case of an employer's being defrauded by some agent whose engagement has not placed him under such a control as would render him a "servant," and so bring him within the law of embezzlement. And a trustee, since he has possession and even legal ownership of the things he holds for his *cestui que trust,* could not by appropriating them commit any offence against the common law. It altogether ignored the existence of such trusts, even for civil purposes; not regarding a breach of trust as creating any debt, still less any crime. A dishonest trustee thus enjoyed in penal law an immunity as unreasonable as the excessive civil responsibility which equity, on the other hand, imposes upon even honest trustees if they prove complaisant or unbusinesslike[2].

Happily, in recent times, a much-needed extension of the criminal law has been effected in these respects. Thus, as to appropriation by agents, some limited and tentative provisions[3] were initiated so far back as 1811; and have recently been expanded into a comprehensive form in the Larceny Act, 1901[4]. This statute renders it a misdemeanor for any person fraudulently to convert to his own use, or to that of any other person, any property—or the proceeds of any property—which he (whether solely or jointly with some other person) has been entrusted with:—

either (*a*) for, or on account of, any other person;

or (*b*) in order that it, or any part of it, or any proceeds of it, may be retained by him in safe custody, or

[1] *Supra*, p. 230. [2] Williams' *Personal Property*, Part III. ch. I.

[3] Subsequently embodied in 24 and 25 Vict. c. 96, ss. 75—79.

[4] 1 Edw. VII. c. 10. It covers realty as well as personalty.

may be applied or paid or delivered by him for any purpose or to any person.

Fraud is necessary; and pure carelessness, however gross, will not render an agent indictable. The maximum punishment is higher than that of simple larceny; being penal servitude for seven years. This enactment does not extend to mortgages of either real or personal property. Nor does it extend to "trustees on any express trust created by a deed or will." Mere equitable owners must accordingly rely upon the protection which was given to them by Lord Westbury's Act of 1857[1], and is now embodied in a clause of the Larceny Act, 1861[2]. Under this a trustee of either real or personal property is punishable with seven years' penal servitude, if, with intent to defraud, he converts or appropriates to any other purpose than that of his trust, any property which has been given to him on an express trust *created in writing*[3]. This extension of the criminal law to the protection of mere equitable ownership was an experiment so novel that it was attended by some noteworthy qualifications. Thus no trustee can be thus prosecuted without the leave of the Attorney-general. And if proceedings have already been begun in any civil court in respect of the breach of trust, the person who has taken them must obtain the leave of that court before beginning a criminal prosecution. Moreover, by a clause added by Lord Cairns[4], the criminal liability thus created is not to prejudice any agreement which the trustee may have entered into for making good the loss caused by his dishonesty. So that even a bargain by him to make restitution in consideration of not being prosecuted, would appear to be rendered enforceable, in spite of the ordinary rules as to contracts that are against public policy[5], and unindictable, in

[1] 20 and 21 Vict. c. 54, s. 13. [2] 24 and 25 Vict. c. 96, s. 80.

[3] In the case of agents, writing was similarly necessary, until the Act of 1901; thus leaving free (Lord Halsbury says) ninety-nine agents in every hundred. [4] s. 86.

[5] Anson on Contracts, Part II. ch. v. § 1, ii *a*.

spite of the ordinary rule against "compounding" a misdemeanor[1]. A further remarkable clause[2], applying not only to trustees but also to agents and the other similar fiduciary misdemeanants, exempts them from criminal prosecution if the misdemeanor was first disclosed by them in the course of civil proceedings instituted against them by the person defrauded; but removes their privilege as to refusing to incriminate themselves when examined in these civil proceedings.

THE FORMS OF THEFT.

It may be convenient, at this stage, to summarise the chief results which, step by step, we have arrived at, in discussing the historical development of the English law of theft. Four leading classes of cases must be carefully distinguished:—

1. The owner gives up no rights at all; and the article is taken entirely without his consent. This clearly is Larceny.

2. The owner gives up physical possession (*i.e.*, "custody"), though retaining legal possession; and then the custodian appropriates. This is Larceny, even at common law.

3. The owner gives up both physical and legal possession; and then the possessor appropriates. Here:—

   (i) If possession were obtained *animo furandi*, then the fraud vitiates the consent, and there is a "Larceny by a trick." *E.g.*, a plough is borrowed with intent to steal it; or a sovereign is handed to a cabman, who *knows* it has been given in mistake for a shilling.

   (ii) If possession were obtained *bonâ fide*, then the subsequent appropriation is no crime at common law.

[1] *Infra*, ch. XVII.

[2] 24 and 25 Vict. c. 96, s. 85.

But by statute, even if possession were obtained *bonâ fide*, yet if it had been obtained

(*a*) by a clerk or servant, receiving for his master from a *third* person, appropriation by him is an Embezzlement;

(*b*) by any person who is to deliver up the specific article, appropriation by him is a Larceny, under statute.

(*c*) by an Agent who comes within the Larceny Act, 1901, appropriation by him is a misdemeanor[1].

4. The owner gives up not only physical and legal possession, but also ownership. This cannot be a Larceny (either at common law or by statute), or an Embezzlement. But it may be the misdemeanor of an "Obtaining by false pretences[2]," or of an appropriation by an Agent[1] or by a Trustee[3].

Our account of the closely allied offences of common law larceny, statutory larceny, "quasi-larceny," and embezzlement, will have enabled the student to appreciate Mr Justice Wright's criticism that "The English law of criminal misappropriation has been...extended piecemeal, by fictions and by special legislation confined to particular instances;...and the resulting mass is at once heterogeneous and incomplete[4]." The prospect of a scientific reform in this, as in various other branches of our penal law, was, for a time, held out by the efforts of Lord Beaconsfield's government, a score of years ago, to enact a Criminal Code[5]. It was proposed to abandon the term Larceny and to replace it by that of "Theft"; which it defined[6] as being—"Fraudulently, and without colour

[1] *Supra*, p. 235. [2] See ch. xv. [3] *Supra*, p. 236.

[4] *Draft Criminal Code for Jamaica*, p. 110.

[5] *Infra*, Book IV. *ad finem*.

[6] See Stephen, *Hist. Cr. Law*, pp. 162—8. It is instructive to compare with this the definitions of recent Continental codes. *Italian Penal Code* of

of right, taking or converting to the use of any person anything capable of being stolen, with intent" (*inter alia*) "...to permanently deprive the owner, or any person having any special property or interest therein, of such thing or property or interest." And things capable of being stolen were made to include "all tame animals, all confined wild animals, and all inanimate things which either are, or may be made, movable, (except things growing out of the earth and not worth more than a shilling)." No carrying away was to be required; and no change of possession; and the very act of rendering the thing movable might suffice to constitute a Theft.

1890, s. 402:—"To possess oneself of a movable thing belonging to another person, for the purpose of deriving advantage from it, and take it away from the place where it is, without that person's consent." *German Penal Code* of 1870, s. 242:—"To take away a movable thing which is not the taker's own, from some other person, with the intention of illegally appropriating it." Still briefer, though earlier, is the French definition (*Code Pénal*, s. 379), "Whoever has fraudulently taken away a thing which does not belong to him is guilty of theft."

CHAPTER XV.

FALSE PRETENCES.

THE common law, as we have seen, treated Dishonesty as a felonious crime only when it took the form of an actual wrong to the owner's Possession[1]. But it also regarded dishonesty as sufficiently affecting the public to be made criminal, though only in the degree of misdemeanor, whenever an owner had been induced to alienate his goods or money to some knave by any device that was calculated to deceive, not merely him, but people in general. The protection of public trade seemed to require this restraint upon the use of false weights or measures or hall-marks. But it was no offence to get a man to pay money, or give away property, by telling him some lie in a merely private transaction. Where *A* got money from *B* by pretending that *C* had sent him for it, Lord Holt grimly asked, "Shall we indict a man for making a fool of another?" and bade the prosecutor to have recourse to a civil action[2]. But a statutory provision for the punishment of mere private cheating was made in 1827, and is embodied in the Larceny Act of 1861[3]; so that it is now an indictable misdemeanor to "obtain from any other person by any false pretence any chattel, money, or valuable security, with intent to defraud."

Under this enactment three points arise for our consideration:—(1) the Right obtained, (2) the Thing which is

[1] *Supra*, pp. 182–3.
[2] *Reg.* v. *Jones*, 1 Salk. 379; 2 Ld. Raymond 1013.
[3] 24 and 25 Vict. c. 96, s. 88.

the subject-matter of that right, and (3) the Pretence by which the obtaining is effected.

(1) *The Right.* The offence before us is committed when persons get goods dishonestly by fraudulently inducing the owner to make over to them at once the immediate ownership in those goods. We have already seen that for such persons the law of larceny provides no punishment. Sometimes, however, where frauds of this kind are attempted, they do unexpectedly turn out to be larcenies, because of some legal difficulty which has prevented the ownership from actually passing.

One such difficulty may be that the deceit, which has been practised, related to facts so fundamental to the intended alienation that error as to them will render the whole transaction null and void, and thus prevent the supposed alienation from effecting any transfer of ownership at all[1]. *A*, for instance, may obtain goods from *B* by personating *C*[2]; or *A* may purchase goods from *B* on his own account, but with a secret intention never to pay for them[3]. In such cases the carrying-off of the goods will, as we have seen, amount to "larceny by a trick[4]." But wherever the alienation is not thus utterly void from the outset, there will be no larceny. And, in the great majority of cases of fraudulent obtaining, the fraud does not relate to a fundamental fact, but to some merely extraneous one, errors as to which do not render the transaction void but only voidable[5]. Ownership therefore passes in such cases, notwithstanding the false pretence; though the defrauded owner has a right to rescind the alienation and to cause the property to revest in him.

[1] *Cundy* v. *Lindsay*, L. R. 3 A. C. at pp. 465, 467–8.

[2] *Rex* v. *Longstreeth*, R. and M. 137.

[3] *Rex* v. *Gilbert*, 1 Moody 185 (K. S. C. 353).

[4] *Supra*, p. 206.

[5] Anson on Contracts, Part II. ch. IV. s. 1, contrasted with Part II. ch. IV. s. 3; Pollock on Contracts, ch. VIII. pt. II.; Pollock and Wright on Possession, p. 100.

Yet, even should he do so, this revesting will have no retrospective operation on the thief's criminal liability; and thus will not convert his conduct into a larcenous taking[1]. Moreover even this right to rescind and revest will be extinguished if, before it has been exercised, the thief should dispose of the goods for valuable consideration to some innocent purchaser; and, against such a purchaser, even an ultimate conviction of the offender will not suffice to revive the original owner's rights[2].

Another cause which may similarly defeat an intended alienation, and prevent ownership from passing, is that the person who attempted to alienate had not the legal power to do so. Thus if a man tries to obtain the property in goods by a fraud practised, not upon the owner himself, but upon his servant, and if that servant had only a limited authority to dispose of these goods, and one too limited to cover the transaction in question, then the carrying them off will be a larceny[3]. Hence, as a postmaster receives from London specific instructions for all "money orders" (unlike mere "postal orders") which he ought to cash, the money he pays on a forged money order is taken from him by a larceny. But, on the other hand, money paid by him on a forged "postal order," (with regard to which he receives no specific instructions), would become the property of the payee, and accordingly would be obtained by false pretences, and not by a larceny. (The general extent of the authority of Post Office servants to part with the moneys of the Postmaster-General has not yet been precisely settled; *e.g.*, it is still uncertain whether it extends to cover payments made by them by mistake[4].) And as every bank cashier has a full and general authority to part with the money entrusted to

[1] *Per* Wills, J., in *Reg.* v. *Clarence*, 22 Q. B. D. at p. 27.
[2] Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24 (2)).
[3] *Reg.* v. *Stewart*, 1 Cox 174.
[4] *Reg.* v. *Middleton*, L. R. 2 C. C. R. 38 (K. S. C. 266).

him by his employer for the purposes of business, it follows that any coins paid by him in cashing a forged cheque become the property of the recipient. The latter, therefore, obtains them by false pretences and does not commit larceny[1].

It is not essential that the right obtained should be that of a full ownership. It appears to be sufficient for this offence, as for larceny[2], to deprive a man of his whole indefeasible interest in the thing, even though he be no more than a bailee. Hence the owner himself may be convicted of obtaining the thing by false pretences from his bailee[3]. But it does not seem that the offence can be committed without obtaining actual possession, and not merely a bare right, as in the case of fraudulently obtaining mere title to a cargo that is at sea. There is no case, or even dictum, for allowing an indictment for obtaining by false pretences when there has been no delivery. But so long as there has been a delivery, it is not necessary that it should have been made to the same person who made the false pretence. For s. 89 of the Larceny Act, 1861, provides that there is a sufficient "obtaining" even if the prisoner's false pretence caused the thing to be delivered to some other person than himself.

But in false pretences, just as in larceny, there must be an intention to deprive the injured person of his whole interest, and not merely of the temporary use of his interest. Thus to obtain by fraud the loan of a horse for a day's ride does not come within the statute[4]. Objection has consequently been taken to the ruling in *Reg.* v. *Boulton*[5]—where a conviction was upheld for obtaining a railway ticket by false pretences—on the ground that the possession and property of the railway ticket are to be restored to the Company when the journey is over, and therefore that a full criminal "obtain-

[1] *Reg.* v. *Prince*, L. R. 1 C. C. R. 150.
[2] *Supra*, p. 196.
[3] *Reg.* v. *Martin*, 8 Ad. and E. at pp. 485, 488. Cf. Dearsly 145.
[4] *Reg.* v. *Kilham*, L. R. 1 C. C. R. 261 (K. S. C. 243). Cf. p. 210 *supra*.
[5] 1 Den. 508.

ing" of the property in it never took place. But surely a person who, on abandoning his idea of making the journey, destroys his ticket, does not infringe any right of the railway company. If so, their only right must be a merely contractual one, against him, (viz., a right that, if he should actually take the journey, he will give up the ticket to them); and not a right of ownership in the ticket itself.

(2) *The Thing.* What we have just said suffices to shew that the legal distinction between larceny and a mere obtaining by false pretences is often hard to trace. The two offences being so closely akin, it is not surprising that the technicalities of the older one—as, for instance, with regard to the subject-matters capable of being stolen—should have affected even the more modern of the two. Thus an indictment for obtaining by false pretences will not lie unless the thing obtained were either (1) a valuable security, or else (2) such a chattel as was a subject of larceny at common law[1]. Thus the offence does not include a fraudulent obtaining of real property, or of anything "savouring" of the realty[2], or of those chattels which are considered as of insufficient value for larceny (*e.g.*, dogs); whilst a railway ticket, being considered sufficiently valuable in itself to be larcenable, may be the subject of an indictment for obtaining it by false pretences[3]. So, again, if what was obtained by the false pretence were not a Thing at all, but only an act of service, the offence is not committed; as where a man secures a ride in a train by saying, "I am a season ticket holder." (It may, however, be noted that under the London Cab Act, 1896[4], it is a specific petty offence, punishable on summary conviction, to hire a cab *in London* with intent to avoid payment of the lawful fare. And the Larceny Act, 1861,

[1] *Supra*, pp. 197—203.

[2] *Reg.* v. *Pinchbeck*, C. C. C. Sess. Pap. CXXIII. 205 (K. S. C. 355); *Reg.* v. *Robinson*, Bell 35 (K. S. C. 357).

[3] *Reg.* v. *Boulton*, 1 Den. 508.

[4] 59 and 60 Vict. c. 27.

by s. 90, makes it an indictable misdemeanor to procure by false pretences the execution of any valuable security.)

(3) *The Pretence.* The false representation may be made expressly in words, either written or spoken; but it is quite sufficient if it can be even implied from them, or from mere silent conduct. But the words or the conduct must be fairly capable of conveying the false meaning, and must have been intended to convey it. For a mere huckster to give an order for goods to an extent so great that only a man in a very large way of business could require them, may thus amount to a false pretence[1]; and so may the packing up of goods made by yourself in wrappers closely resembling those used by some well-known firm of manufacturers[2]. And again, without any deceptive words at all, the mere act of wearing a cap and gown, in a University town, may be enough to constitute a representation that you are a member of its University[3]. Similarly, quite independently of the use of any words asserting the genuineness of the article, there would be a false representation in passing a note of a wound-up bank; or, again, in offering for sale a fowl's body with a turkey's head sewn on to it, or a sparrow painted as a canary, (such as an eminent living judge is said to have described as a "gaolbird").

We have seen that the pretence must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture, upon which every person must exercise his own judgment. If the buyer says, "Send me the meat and I will pay to-morrow," it is for the butcher to determine whether he will part with the meat on the strength of this promise. If, therefore, the customer fails to fulfil his

[1] *Reg.* v. *Cooper*, L. R. 2 Q. B. D. 510 (K. S. C. 333).

[2] *Reg.* v. *Smith*, D. and B. 566 (K. S. C. 186), *per* Pollock, C.B.

[3] *Rex* v. *Barnard*, 7 C. and P. 784 (K. S. C. 333).

promise, the butcher cannot prosecute him for obtaining the meat by false pretences, but can only sue him in a civil action to recover the price of it. In like manner, to borrow money under the pretence that you will use it in paying your rent, is not an obtaining by such a false pretence as will come within the statute[1]. This distinction between Present and Future is, however, now being undermined by the principle that representations, which do not expressly mention anything but the future, may nevertheless imply a representation about the present;—viz., a representation that the existing state of affairs is such that, in the ordinary course of events, the future occurrence mentioned will take place. Thus it has been held that sending the half of a bank-note, along with an order for goods, is not merely a promise that on a subsequent occasion the other half shall be sent, but implies also a representation that at the present time the sender already possesses that other half[2]. Similarly the familiar act of drawing a cheque—a document which on the face of it is only a command of a future act—is held[3] to imply at least three statements about the present:—

(1) That the drawer has an account with that bank;

(2) That he has authority to draw on it for that amount;

(3) That the cheque, as drawn, is a valid order for the payment of that amount; (*i.e.*, that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured).

It may be well to point out, however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for; inasmuch as it is quite

[1] *Reg.* v. *Lee*, L. and C. 309 (K. S. C. 323).
[2] *Reg.* v. *Giles*, L. and C. 502; *Reg.* v. *Murphy*, Ir. Rep. 10 C. L. 508 (K. S. C. 338).
[3] *Reg.* v. *Hazelton*, L. R. 2 C. C. R. 134 (K. S. C. 336).

in the ordinary course of business that he may have authority to overdraw, or that he may intend to pay in (before the cheque can be presented) sufficient money to meet it. These doctrines apply not only to ordinary cheques, which are payable forthwith, but even to post-dated ones[1].

It has sometimes been suggested that when a man orders a meal at a restaurant he impliedly makes a representation as to his present ability, and present intention, to pay for it. But to treat every order for goods as if it impliedly contained the words, "I can pay," would render it dangerously easy for disappointed creditors to call in the law of False Pretences to the assistance of the law of Debt. Accordingly it is now settled[2] that the penniless man, who orders and eats a meal at a restaurant, does not thereby make any implied false statement about the present. But though his deceit relates only to the future, it is enough to constitute an "obtaining credit by fraud," which is a specific statutory misdemeanor under the Debtors Act, 1869[3]; although the credit given by the innkeeper was to last only until the end of the meal.

Where it is by the joint operation of several representations, that a person has been induced to part with property, the offence may be committed although some of them were mere promises about the future, if even one of them was a representation of a present fact. In other words, it is sufficient that the false representation of present fact was essential to the transaction; even though it alone would not have been enough to induce the owner to part with his property. Thus if a married man represents himself as unmarried, and proposes marriage to a woman, and thereupon obtains

[1] *Rex* v. *Parker*, 7 C. and P. 828, 2 Moody 1.

[2] *Reg.* v. *Jones*, L. R. [1898] 1 Q. B. 119.

[3] 32 and 33 Vict. c. 62, s. 13. The maximum punishment is only a year's imprisonment, with hard labour. This enactment has as yet been little used by prosecutors; but seems likely to be often put in force, now that persons of small means gamble so largely in Stock Exchange transactions.

money from her for the pretended purpose of furnishing their house, he may be convicted of obtaining this money by false pretences[1].

Again, even in the case of statements which clearly relate only to the present, it is often hard to say whether they are statements as to actual facts or merely as to matters of opinion; as in the case of a vendor's exaggerated eulogies of his wares. For in English law, as in Roman[2], the license of trade has established as to "dealers' talk" the lax rule that "Simplex commendatio non obligat." In all bargaining there is usually a conflict between the two parties, in commercial skill and general experience; and it would be perilous to employ the criminal law to regulate this conflict. For a man to represent himself as having "a good business," when he carries on no business at all, is clearly a false statement of a particular Fact[3]. But a similar representation made by a man who has a business, however poor a one, will generally be a mere matter of Opinion[4]. A seller's misrepresentation of the weight of a sack of coal will concern mere matter of opinion, if the sale is for a lump sum; but will concern a fact so fundamental as to render it indictable, if the sale is by weight[5]. In the same way, to falsely represent an article as being silver[6]—or to represent a chain as being of 15 carat gold, when it is really only 6 carat[7]—is a false pretence of fact; the real article being different in *substance* from the pretended article. Yet to represent plated spoons as being "equal to Elkington's A," (or even as having as much silver on them as Elkington's A), has been held to be only exaggerated praise, a mere puffing; inasmuch as the

[1] *Reg.* v. *Jennison*, L. and C. 157 (K. S. C. 324).

[2] Justinian's *Digest*, IV. 3. 37; cf. Benjamin on Sales, III. ii. 1, and IV. ii. 1. 1.

[3] *Reg.* v. *Crab*, 11 Cox 85.

[4] *Reg.* v. *Williamson*, 11 Cox 328. But contrast *Reg.* v. *Cooper*, L. R. 2 Q. B. D. 510 (K. S. C. 333).

[5] *Reg.* v. *Ridgway*, 3 F. and F. 858.

[6] *Reg.* v. *Ball*, C. and M. 249.

[7] *Reg.* v. *Ardley*, L. R. 1 C. C. R. 301 (K. S. C. 331).

person deceived did get plated spoons, differing only in *value* from what he had been led to expect[1].

It is not yet settled whether mere states of mind are to be regarded as "Facts" within the definition of the offence. Will an indictment lie against a man for obtaining goods by a false statement of his present intention to do a certain future act? In *Reg.* v. *Gordon*[2], Mr Justice Wills inclined to think that a merely mental fact would suffice. And on the same side may be urged the celebrated dictum of Lord Bowen that "the state of a man's mind is just as much a fact as the state of his digestion[3]." But if such expressions of Intention are to be recognised as sufficient pretences, it will be hard indeed to distinguish between them and mere Promises, which (as we have seen[4]) are not sufficient to constitute an indictable pretence.

The change of ownership must be not merely preceded by a false pretence, but also actually *caused* by it. Hence when a shopkeeper is actually delivering goods on credit to *A*, it is no offence for *A then* to say falsely, "I am the Earl of *Z*[5]." Similarly, if a false representation had been actually made by the prisoner to the prosecutor's agents, but the agents never communicated it to the principal, before he parted with his goods (so that it was not by it that he was led to act), there must be an acquittal. The same principle applies wherever the pretence did not in fact deceive the person to whom it was made; as in the frequent instances where, on the advice of the police, the recipients of a begging letter send money to the writer of it, in order to expose him. (In such cases, however, the prisoner may nevertheless be

[1] *Reg.* v. *Bryan*, D. and B. 265 (K. S. C. 328).

[2] L. R. 23 Q. B. D. 354 (K. S. C. 326). Cf. the remarks of Hawkins, J., in the similar case of *Reg.* v. *Pockett* (*The Times*, May 14 and 18, 1896).

[3] *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. D. 483; cf. *Angus* v. *Clifford*, L. R. [1891] 2 Ch. D. at p. 470.

[4] *Supra*, p. 245.

[5] *Reg.* v. *Jones*, 15 Cox 475. Cf. *Reg.* v. *Martin*, 1 F. and F. 501 (K. S. C. 339).

guilty of an Attempt to obtain by false pretences—which is a common law misdemeanor.) If, however, the person has in fact been deceived by the false pretence, it does not matter how credulous or how careless he may have been in accepting the prisoner's statement; the offence will have been committed even though the statement was one which even the slightest inquiry would have shewn to be false[1]. Thus a conviction has been allowed where the prisoner obtained money from a wife, whose husband had run away, by falsely pretending to have the magical power of "bringing him back over hedges and ditches[2]."

Even, however, where there is a causal connexion between the pretence and the obtaining, the law will refuse to take cognisance of this causation if it were too remote[3]. But mere lapse of time does not necessarily amount to remoteness. And if the delivery of the article obtained was the object and aim of the false pretence, there will be a sufficiently direct connexion between the pretence and the obtaining, even though what was immediately obtained by the false pretence was not the delivery but merely a contract, the ultimate execution of which produced the delivery[4]. And this, even though the thing delivered was not in existence at the time of the pretence[5]. In the case of races, if a competitor, by making a false statement of his previous performances, obtained an undue allowance in a handicap, and thereby won a prize, it was at one time thought that such a false pretence would be too remote from the obtaining of the prize to be indictable[6]. But it is now definitely settled that this is not so[7]. Had he not won the prize, the running the race would still have been indictable as an attempt to obtain the prize by false

[1] *Reg.* v. *Woolley*, 1 Den. 559.
[2] *Reg.* v. *Giles*, L. and C. 502.
[3] Cf. *supra*, p. 80.
[4] *Reg.* v. *Abbott*, 1 Den. 273.
[5] *Reg.* v. *Martin*, L. R. 1 C. C. R. 56 (K. S. C. 344).
[6] *Reg.* v. *Larner*, 14 Cox 497.
[7] *Reg.* v. *Button*, L. R. [1900] 2 Q. B. 597 (K. S. C. 342).

pretences; but merely entering for the race without running would probably have been too remote an act to constitute even an attempt[1].

Although the offence of obtaining by false pretences is, as we have seen, only a misdemeanor, it is punishable as severely as petty larceny: viz., with penal servitude for not more than five years or less than three, or imprisonment, with or without hard labour, for not more than two years. After the fraud attempted in the famous Tichborne case, an Act was passed (37 and 38 Vict. c. 36) making false *personation*, for the purpose of obtaining either personal or real property, (whether the property be actually obtained or not), a felony, punishable with penal servitude for life.

It remains to add that, upon an indictment for false pretences, a prisoner may now be convicted—and convicted of that very misdemeanor—even though his offence be shewn to have really constituted a larceny[2]. The subtle distinctions between larceny and false pretences have thus lost something of their practical importance.

A restitution order[3] may be had against the actual offender, or his *malâ fide* sub-purchaser, by any prosecutor who has actually become again the owner, *i.e.*, who has legally rescinded the transfer. But the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24), provides that conviction for frauds not amounting to larceny shall not produce such a revesting as to defeat intermediate *bonâ fide* sales. This overrides the reluctant decision of the House of Lords in *Bentley* v. *Vilmont*[4], under which an innocent sub-purchaser had to give up the goods, even in cases of mere false pretences.

[1] *Per* Wright, J., in *Reg.* v. *Button.*
[2] *Supra*, p. 224.
[3] 24 and 25 Vict. c. 96, s. 88.
[4] L. R. 12 A. C. 741.

THE RECEIVING OF STOLEN PROPERTY.

Having now completed our view of the various crimes by which an owner may be dishonestly deprived of his chattels, we may supplement it by an account of a crime which is likely to be committed in the course of the subsequent disposition of that property.

At common law the receiving of stolen goods was, and still is, a misdemeanor[1]. It was necessary that a larceny of the goods should have been committed; yet the receiver was not indictable as an accessory after the fact to this larceny, (unless the receiving in some way assisted the thief's escape from justice), because it was not the thief, but only the goods, that he received. Subsequently, however, by various statutes, (whose provisions are now comprised in the Larceny Act, 1861[2]), the scope of the offence was greatly widened; by extending it to cases where the original act of dishonesty—the "stealing, taking, extorting, obtaining, embezzling, converting, or disposing of," the property—was some lesser form of theft than a larceny. And many cases of receiving were raised from misdemeanors into felonies.

The offence consists of "receiving stolen goods, well knowing them to have been stolen." This involves three points for consideration:—(1) the receiving, (2) the thing received, (3) the guilty knowledge.

(1) There must have been some act of "receiving"; which involves a change of possession. It must therefore be shewn that the prisoner took the goods into his possession, actual or constructive[3]. This cannot be the case so long as the original thief retains an adverse possession of them; (though there may well be an amicable joint possession by a

[1] 1 Hale P. C. 619. See Stephen, *Dig. Cr. Law*, Arts. 382—3.

[2] 24 and 25 Vict. c. 96, ss. 91, etc.

[3] *Reg.* v. *Wiley*, 2 Den. 37 (K. S. C. 361).

receiver and a thief together[1]). But, as in all cases of possession, a person may "receive" without himself taking part in any physical act of receipt. Accordingly if stolen goods are delivered to the prisoner's servant, or wife, in his absence, but he afterwards does some act that implies an acceptance of the goods—as by removing them to some other part of his premises, or by striking a bargain about them with the thief[2]—he will then (though not till then) become himself a "receiver" of them.

(2) It is further necessary that the goods received must have already been stolen, antecedently to the act of receiving. Hence a man cannot become a receiver of stolen goods by himself committing the act of stealing them[3]. Moreover, the character of being "stolen goods" is only a temporary one. For if, after being stolen, the goods happen to return into the possession (actual or even constructive) of their owner, such a return will deprive them of the character of stolen property; so that there will not be any crime in subsequently receiving them[4]. This rule often defeats measures which have been taken by an owner, after detecting a theft, in hopes of entrapping and punishing some intending receiver[5].

(3) Finally, the prisoner must have received the stolen goods with information either of their having been stolen, or at least of circumstances so suspicious as to convince any reasonable man that they had been stolen[6].

As to the punishment of receivers, the main provisions of the Larceny Act, 1861, are as follows:—

1. If the original stealing was a felony, either at common law or by the Larceny Act itself, the receiver may be

[1] *Reg.* v. *Smith*, Dearsly 494.

[2] *Reg.* v. *Woodward*, L. and C. 122 (K. S. C. 364).

[3] *Reg.* v. *Gruncell*, 9 C. and P. 365 (K. S. C. 359).

[4] *Reg.* v. *Schmidt*, L. R. 1 C. C. R. 15; *Reg.* v. *Villensky*, L. R. [1892] 2 Q. B. 597 (K. S. C. 360).

[5] See *Reg.* v. *Dolan*, Dearsly 436; *Reg.* v. *Hancock*, 14 Cox 119.

[6] Wills' *Circumstantial Evidence*, p. 76; L. R. [1892] A. C. 287.

indicted either for a substantive felony or as an accessory after the fact to the original felony of stealing. In either case, the maximum punishment is fourteen years' penal servitude[1]. But these provisions do not apply where it is only by some statute passed subsequently to the Larceny Act that the theft has been rendered felonious[2].

2. If the original stealing was a misdemeanor, (*e.g.*, if the goods had been obtained by false pretences), the receiving is a misdemeanor; and punishable with a maximum punishment of seven years' penal servitude[3].

3. If the original stealing was a petty offence punishable on summary conviction, (*e.g.*, if the thing stolen were only a dog), the receiving is only a similar offence; and is punishable just as the stealing itself is[4].

[1] 24 and 25 Vict. c. 96, s. 91.

[2] *Reg.* v. *Smith*, L. R. 1 C. C. R. 266; *Reg.* v. *Streeter*, L. R. [1900] 2 Q. B. 601 (K. S. C. 367).

[3] 24 and 25 Vict. c. 96, s. 95.

[4] *Ibid.* s. 97.

CHAPTER XVI.

FORGERY.

THE verb "to forge," which originally meant simply "to make," acquired early, even before the time of Shakespeare[1], the special sense of making deceitfully. (The cognate verb "to fabricate" passed through a similar development.) Forgery, accordingly, is the offence of making a false document with intent to defraud[2]. It may be committed by fraudulently making, or even altering, either (1) a writing or seal, to the prejudice of some other person's right, or (2) a stamp, to the prejudice of the public revenue.

The common law treated it only as a misdemeanor, punishable with fine and imprisonment. But, in proportion as the increase of education and the development of commerce multiplied the opportunities for committing heinous acts of forgery, it became necessary to restrain such crimes by more stringent penalties. Accordingly, by a succession of statutes, now consolidated in the Forgery Act, 1861 (24 and 25 Vict. c. 98), many classes of instruments have been covered with a special protection, by making the forging of any of them a felony[3]. Moreover the Forgery Act, 1861, contains also a provision[4], quite general in its terms, which makes it a felony to *obtain property* (or even endeavour to

[1] See Dr Murray's *English Dictionary*.

[2] See Stephen, *Hist. Cr. Law*, III. 180—6.

[3] These will be found enumerated in Stephen's *Dig. Cr. Law*, Arts. 388—402.

[4] s. 38. Fourteen years' penal servitude.

obtain it) by any forged or altered instrument whatsoever. It has indeed been contended that this section only applies to the particular instruments which had been mentioned in earlier sections of the same Act. But in *Reg.* v. *Riley*[1] a majority of the Court held that any document whatever may be regarded as an "instrument" within this section; (and that therefore to send even a false telegram, if it be sent with the view of wrongfully obtaining property, is a statutory felony).

But the common law rule still remains in force; and the forgery of such instruments as are not comprised in any of these numerous statutory classes is accordingly still punishable under it. This, for instance, is the case with certificates of Holy Orders[2], with theatre tickets[3], and with ordinary unsealed written contracts.

The principal points that demand our attention are:—(1) what is a document? (2) when is it considered to be false? (3) what constitutes a making it such? (4) what intent is necessary in order to render the making of it an act of forgery?

(1) The word "Document" will cover any writing whose words purport in themselves to carry legal consequences. It thus includes not only deeds of conveyance, bonds, bank-notes, bills of exchange, bills of lading[4], and similar instruments, but also testimonials and other letters of recommendation[5], or a certificate of identity for obtaining a passport[6], or a marriage register[7], or a magistrate's summons. Yet a picture is not a document. Hence it is no forgery to put on a picture the false signature of some famous painter; for the

[1] L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

[2] *Reg.* v. *Morton*, L. R. 2 C. C. R. 22.

[3] *Reg.* v. *Bennett*, C. C. C. Sess. Pap. LXXIII. 94.

[4] *Stocker's Case*, 5 Mod. 137.

[5] If employment or other *pecuniary* advantage is sought by them. Dearsly 285; Dearsly and Bell 550.

[6] C. C. C. Sess. Pap. c. 644.

[7] *Dudley's Case*, 2 Sid. 71.

painter's signature is not appended to the picture to give any legal efficacy to it[1], but only as a mere identificatory mark. And the same principle applies to the imitation of any trade-mark; which accordingly was not a forgery[2], until specifically made a misdemeanor by statute[3]. Similarly, although if a man, when paying in a shop for goods with a bank-note and some sovereigns, were to put on the back of the note the name of some well-known capitalist, he would commit a forgery, yet there would be no forgery in his also scratching the same name on the sovereigns.

(2) A document is rendered "false," if the effect, which the forgery makes it *seem* to have, is one which the man executing it does not intend to produce, or which (though he does intend to produce it) he cannot legally produce. Accordingly an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to *be* itself that which it is not[4]. In other words a forgery is a document which not only tells a lie, but tells a lie about itself. And if an ordinary person might have been deceived by the apparent purport of the document, it will be no defence to shew that it would only be through an ignorance of law that he could be deceived; as when the document is one which, even had it been genuine, could not legally have produced the purported effect, (*e.g.*, an *un*stamped bill of exchange[5]). The ways in which a document may be "false" are of course innumerable. But the following instances may afford illustrations. If an agent, who has bought goods for his principal, alters the receipt for the price from £5 to

[1] *Reg.* v. *Closs*, D. and B. 460 (K. S. C. 184).

[2] *Reg.* v. *Smith*, D. and B. 566 (K. S. C. 186).

[3] Merchandise Marks Act, 1887 (50 and 51 Vict. c. 28, s. 2), following 25 and 26 Vict. c. 88.

[4] *Reg.* v. *Ritson*, L. R. 1 C. C. R. 200 (K. S. C. 188).

[5] 2 East P. C. c. 19, s. 43. Contrast *Rex* v. *Jones*, 1 Douglas 300 (K. S. C. 200).

£15 by adding a figure, in hopes of pocketing the difference, he thereby commits a forgery. Again, the fraudulent antedating of a cheque—or of a deed if the date of it be material[1]—will be a forgery. Similarly, to despatch a telegram which purports to have been handed in at an earlier time than it in fact was, may be a forgery. Thus where a telegraph clerk, immediately on hearing the result of a race. despatched to a bookmaker a telegram making a wager on the winning horse, and purporting to have been handed in at the post office before the race was run, he was held to have committed forgery[2]. Again, a person to whom a merely limited authority to act as agent has been given, may commit forgery by exceeding this authority. Thus if a servant, to whom £2 are due for wages, receives from his employers a cheque in his own favour, duly signed but with the amount left blank, and is told to fill it up for the £2, he will become guilty of forgery if he fills it up for £3[3]. But it is otherwise if the agent has a general authority; or if, though he has merely a limited authority, he makes only such a document as comes within the limit. Accordingly if, when a blank signed cheque has been entrusted to a man, with authority to fill it up for an amount to be calculated by him, he fills it up for that amount correctly, but goes on wrongfully to cash it and to appropriate the proceeds, his crime will not amount to a forgery[4].

There are many cases in which, without being directly false, a document may nevertheless by mere implication tell a sufficient falsehood about itself. Thus such a falsity may be produced by making a promissory note in the name of an utterly imaginary person[5]; or even by adding, to the name of one of the actual parties to some instrument, the address of some other and wealthier person of the same name, (and

[1] *Reg.* v. *Ritson*, loc. cit.

[2] *Reg.* v. *Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

[3] *Reg.* v. *Bateman*, 1 Cox 186 (K. S. C. 191).

[4] *Ibid.*

[5] *Rex* v. *Lewis*, Foster 116 (K. S. C. 195).

thus, for instance, giving a fictitious value to a bill of exchange)[1]. Similarly there may be a sufficient falsity in a man's merely signing his own name, if he do this in order that it may be mistaken for the signature of another person of the same name; as where he indorses a bill which was remitted to some other person of his name, but by mistake came to him instead[2]. In all these cases there is a forgery; for one person makes a writing which represents itself as the act of some other person, whether real or fictitious. But when a man puts forward a document as emanating, not from any other person, but strictly from himself, it will not be rendered a false document by his adopting for himself an assumed name in his signature to it, if he has no intention of thereby defrauding anyone of anything[3].

If a document is not *itself* false in any way, the mere fact that it is put to a fraudulent use will not make it a forgery. Thus where wrappers were printed in imitation of those used by a well-known firm, but the goods of a less famous firm were packed in them for sale, the mere printing of these wrappers was held not to constitute a forgery[4]. (But the actual use of them in trade would involve the crime of an attempt to obtain money by false pretences.)

(3) The act of "making" a false document may be committed either (i) by affixing to it a seal or a stamp, or altering one that is already on it[5], or (ii) by either writing or erasing, in the document itself, any words or letters or figures, even though they do not constitute the whole of the document but only a part of it[6], (*e.g.*, the signature). There may

[1] *Reg.* v. *Blenkinsop*, 2 C. and K. 531 (K. S. C. 193).

[2] *Mead* v. *Young*, 4 T. R. 28 (K. S. C. 197); *Rex* v. *Parkes*, 2 Leach 775. Cf. *Reg.* v. *Mahoney*, 6 Cox 487.

[3] *Reg.* v. *Martin*, L. R. 5 Q. B. D. 34 (K. S. C. 199).

[4] *Reg.* v. *Smith*, D. and B. 566 (K. S. C. 186).

[5] See *Reg.* v. *Collins*, 2 Moody and Rob. 461.

[6] 2 East P. C. c. 19, s. 4.

even be a forgery by a mere inactive omission, provided that the words omitted would have qualified the operation of those that remained. Thus it is forgery for an amanuensis, when taking down a will from a testator's dictation, fraudulently to omit a condition attached to one of the legacies. It has, however, been said that it would not be a forgery for him to have omitted the legacy altogether[1]; but Mr Justice Stephen[2] insists that this distinction is idle, as the omission of a legacy must increase the residuary estate, and consequently must qualify the operation of the rest of the will.

A man may be guilty of forging a document even though no part of it was actually written by him. Thus the written transcript of a telegraphic message, made out at the arrival office, is made by the hand of a purely innocent agent, the post office clerk; but the sender of the telegram is as much responsible for it as if he had written it with his own hand[3]. Yet it has been held not to be forgery merely to use fraud (however gross) to procure the execution of a document. Thus it was decided in *Reg.* v *Chadwick*[4] that it is no forgery to get a man to sign a document by misrepresenting to him its contents. And even in a case where a person, who was unable to read or write, was induced to execute a document by a deceitful assurance that it was only a form of nomination for a candidate for Parliament, (whereas it really was a deed of conveyance), the deceiver was held not to be guilty of forgery[5]. But this decision is doubted by Mr Justice Stephen[6] and by Mr Greaves[7]; who maintain that his conduct constituted an act of forgery by an innocent agent. The question has similarly been raised, whether it would be forgery for persons to induce an imbecile invalid to put his indorse-

[1] 1 Hawkins P. C. p. 265.
[2] *Dig. Cr. Law*, 5th ed. p. 326.
[3] *Reg.* v. *Riley*, L.R. [1896] 1 Q.B. 309 (K. S. C. 179).
[4] 2 M. and R. 545.
[5] *Reg.* v. *Collins*, 2 M. and R. 461.
[6] *Dig. Cr. Law*, 5th ed. p. 26.
[7] Russell on Crimes, 4th ed. p. 718.

ment unintelligently to a bill of exchange, their object being to get it discounted for their own accommodation.

(4) It only remains to consider whether it is necessary that the forger should have had any specific form of *mens rea* in deceitfully making the false document. In all common-law forgeries it is necessary that the deceit should have been intended to defraud[1]. A few statutory forgeries may, however, be found, the definition of which does not render necessary any fraudulent intent; *e.g.*, the forging of the royal seals[2], or of marriage licences or marriage certificates[3], or of telegrams[4]. It is thus made an offence to forge a telegram, —*i.e.*, to send one so signed as to purport to come from a person other than the actual sender—even though the object in view were not to defraud, but to decoy a suspected person to some place where he could be detected or arrested, or even merely to obtain the amusement of hoaxing the recipient. But in most statutory forgeries an intention to defraud is as necessary as it is in all common-law ones. Originally, indeed, it was further necessary that the indictment should specify the particular person against whom this intention to defraud had been directed. But under an enactment of 1850[5] it became sufficient (both in cases of statutory and of common-law forgeries) to allege in general terms an intention to defraud, without shewing—either in the indictment or even by the evidence—what particular person was intended to suffer. By "defraud" is meant, not merely to deceive, but also, by means of that deception, to induce the deceived person to alter (or abstain from altering) his legal rights[6]. Yet it is not necessary that the forger should have intended the deceived person to incur any actual pecuniary

[1] *Reg.* v. *Hodgson*, D. and B. 3 (K. S. C. 202).
[2] 24 and 25 Vict. c. 98, s. 1. [3] *Ibid.* s. 35.
[4] The Post Office Protection Act, 1884, 47 and 48 Vict. c. 76, s. 11.
[5] Now represented by s. 44 of 24 and 25 Vict. c. 98.
[6] *Reg.* v. *Hodgson*, D. and B. 3 (K. S. C. 202).

detriment. Consequently a man may be fully guilty of having forged an acceptance, although he may from the outset have fully intended to "take it up" before it should fall due[1], or although the money which he aimed at getting by the forgery was only a sum that was legally due to him[2]. The mere existence, in the prisoner's mind, of this intent to defraud will suffice, though (*a*) no one was in fact defrauded[3], and though (*b*) no particular individual was aimed at in the prisoner's scheme[4], and even though (*c*) there did not in fact exist any one whom the scheme could have defrauded[5]. Thus if the person, whose signature has been forged as the drawer of a cheque, has ceased to have any account at the particular bank[6], this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that some one or other might possibly be defrauded[7]. Thus it will be no forgery for a man, who is himself the sole payee of a bond, to alter it by lessening its amount[8].

As regards the evidence necessary, we may mention that merely to shew that a defraudable person existed, will be sufficient to afford *primâ facie* proof of an intent to defraud. But it is an unsettled point whether the mere making a false document is of itself sufficient to prove (*primâ facie*) that a defraudable person did exist, and consequently to prove that there was an intent to defraud[9]. The best evidence of an intention to defraud will be the fact of the forger's having actually "uttered" (*i.e.*, attempted to pass off) the forged document. But the offence of forgery consists,

[1] *Rex* v. *Hill*, 2 Moody 30 (K. S. C. 208).
[2] *Reg.* v. *Wilson*, 1 Den. 284.
[3] *Rex* v. *Crooke*, 2 Strange 901.
[4] 24 and 25 Vict. c. 98, s. 44. *Rex* v. *Mazagora*, R. and R. 291.
[5] *Reg.* v. *Nash*, 2 Den. 493.
[6] *Rex* v. *Crowther*, 5 C. and P. 316.
[7] *Reg.* v. *Marcus*, 2 C. and K. 356 (K. S. C. 205).
[8] *Blake* v. *Allen*, Moore 619.
[9] *Reg.* v. *Tuffs*, 2 Den. 319.

as we have seen, in the mere making; and is complete without any "uttering[1]." Hence a person who only utters a forged instrument, even with full guilty knowledge, does not commit a "forgery" of it. But a fraudulent act of uttering is itself an offence; and incurs whatever punishment a forgery of the particular document would have involved[2].

The punishments of forgeries vary very greatly[3]. Thus the forging of the Great Seal used to amount to a treason; but by a statute passed in 1831[4], it was reduced to a felony. The various forgeries that have by statute been made felonies, have their respective maxima of punishment; ranging from penal servitude for life (as in the case of forging the Great Seal) to penal servitude for seven years; whilst, instead of penal servitude, imprisonment may be imposed for any term not exceeding two years, with or without hard labour. But any forgery that is still a mere common-law misdemeanor, is punishable only by imprisonment and fine.

[1] 2 East P. C. 861.

[2] *Reg.* v. *Sharman*, Dearsly 285.

[3] And with "so little of principle, that offences of similar gravity may be found to be punishable, one with penal servitude for a long term, another only with short imprisonment" (Mr Justice Wright's *Draft Criminal Code for Jamaica*, p. 111).

[4] Now represented by s. 1 of 24 and 25 Vict. c. 98.

CHAPTER XVII.

OFFENCES AGAINST THE SAFETY OF THE STATE.

PASSING from offences committed against Property to the offences against Public Rights, our account of these latter must commence with what the law ranks as the most heinous of all crimes—that of Treason[1]—"the atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society[2]." Its name, derived from the French *trahir* and Latin *tradere*, denotes an act of perfidious "betrayal." The offence might, at common law, be committed either by a breach of the faith due to the King from his subjects (High treason), or even by a breach of that due to one of those subjects from his own inferiors (Petit treason). But a sufficiently grave breach of the latter form of allegiance could only be committed by the actual slaying of the superior; as when a feudal vassal murdered his lord, a priest his bishop, or a wife her husband. Since 1828, such homicides have ceased to differ from ordinary murders[3]; so that high treason is now the only kind of treason known to our law.

An indictment for high treason was in mediæval times a most powerful weapon for the Crown to wield against its two great rivals, the church and the baronage. For a "clerk" who was accused of this crime could not claim benefit of

[1] See Pollock and Maitland, I. 498—507; Stephen, *Hist. Cr. Law*, II. 241—297.

[2] *Per* Marshall, C.J., 4 Cranch (U.S.A.) 127.

[3] 9 Geo. IV. c. 31, s. 2.

clergy[1]; and if any feudal vassal was convicted of it, his lands passed to the Crown instead of to his immediate lord. Hence the King's judges, attentive to their master's interests, expanded the definition of high treason until it became a most comprehensive offence, including any kind of injury to the King's rights, *e.g.*, even the hunting of deer in his forests. At last a reaction was provoked. In the reign of Edward III., one John Gerbage of Royston laid hands on one William of Bottisford and would not release him until he made a payment of £90. This act of unlawful imprisonment was construed as an act of treason, on the plea of its being an "accroaching of the royal power." At this the barons forthwith took action[2]; and succeeded in confining the law of treason within definite limits by the enactment, in 1351, of the Statute of Treasons[3]. This measure is remarkable; both for the constitutional securities directly conferred by it[4], and also from its affording, at so early a date, what is still almost the only instance in which any statutory definition of an important crime has entirely superseded the older common law with regard to it. It limited high treason to seven possible forms; (two of which have since been reduced to felonies). The seven were:—

1. Compassing[5] the death of the King, of his Queen, or of their eldest son and heir.

So far as these words go, the crime seems to consist in a mere state of mind. But an *actus reus* is made necessary by words in a subsequent part of the statute, which require the

[1] *Infra*, p. 480. Pollock and Maitland, I. 429; II. 500.

[2] Reeves' *History of English Law* (ed. Finlason), II. 317.

[3] 25 Edw. III. c. 2. "Accroach" = appropriate.

[4] "No people enjoy a free constitution unless adequate security is furnished by their laws against the discretion of judges in a matter so closely connected [as the law of treason is] with the relation between the Government and its subjects"; Hallam's *Constitutional History*, ch. XV. pp. 203—226, (a passage deserving careful study).

[5] Austin's *Jurisprudence*, Lect. XXI.

person accused to "be thereof proveably attainted of *open deed*[1]." It was for this incipient offence of "compassing the death" of the King, that the regicides of Charles the First were indicted; the ultimate act of taking off his head being merely treated as one of the open deeds which made manifest that compassing[2].

That in treason, just as in all other crimes, a *mens rea* will not constitute guilt without an *actus reus*, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of the United States troops, could not be convicted of treason[3].

An "open deed," or "overt act," has been defined by Alderson, B., as "any act, measure, course, or means whatever, done, taken, used, or assented to, for the purpose of effecting a traitorous intention[4]"; and, more tersely, by Lord Tenterden[5] as "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object." Thus even so commonplace an event as hiring a boat at a riverside wharf may amount to such an act[6]. And the collecting of information for the use of the King's enemies, though it never be actually sent to them, clearly amounts to one[7]. And even a conspiracy, though going no further than the oral conversation, constitutes a sufficient overt act[8]. But mere spoken words, however

[1] These words do not occur in the statute until the conclusion of the fourth species of treason. But the judges, in construing the statute, did not limit them to that species; and ruled that, in indictments for any form of treason, a specific overt act must be alleged. The first form, it being the only one which is purely mental, is that case in which this rule assumes its chief importance. See Foster's *Crown Law*, p. 220; and 1 Hale P. C. 108.

[2] 5 St. Tr. 982.

[3] *Commonwealth* v. *Malin*, 1 Dallas 33.

[4] 6 St. Tr. (N. S.) 1133.

[5] *Rex* v. *Thistlewood*, 33 St. Tr. 684.

[6] *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).

[7] *Rex* v. *Delamotte*, 22 St. Tr. 808.

[8] See 7 St. Tr. (N. S.) 463.

seditious and violent, are not as a general rule an overt act[1], yet they may become one if they are not simply "loose words, spoken without relation to any act or project," but help to carry forward, or are connected with conduct which carries forward, the intention which they express[2]. Thus words inciting some one to kill the King are an overt act of high treason. Indeed spoken words, uttered with an intent to confirm men in the prosecution of measures for a deposing of the King by force of arms, "are in their very nature and essence the clearest and most absolute overt acts of high treason[3]."

But the publication of *written* words, since they are in a more permanent form, and have usually been composed with more deliberation, than mere spoken ones, may be a sufficient overt act of treason; even when it is unconnected with any plan for further conduct of a treasonable character. Yet, whilst published writing may clearly be thus an overt act, it is quite uncertain how far, if at all, the mere writing of a document, without ever publishing it, can be an overt act. In 1615, Edward Peacham[4] was convicted of treason on account of certain passages in a sermon found in his study, which had never been preached. But he was never executed; and died in prison. Algernon Sidney[5] again, was similarly convicted of treason in 1683, on account of an old unpublished MS. treatise on Sovereignty, found in his house. He was executed; but his conviction was subsequently reversed by Parliament. Hence neither of these two cases is of weight as a precedent. Had Sidney's papers been, on the other hand, plainly referable to some definite project of insurrection, they might of course have constituted an overt act.

[1] Foster 200; *Pyne's Case*, Cro. Car. 117 (K. S. C. 377).

[2] *Rex* v. *Charnock*, 2 Salk. 633 (K. S. C. 379), *per* Lord Holt.

[3] *Per* Lord Ellenborough in *Rex* v. *Despard*, 28 St. Tr., at p. 487.

[4] 2 St. Tr. 869. Hallam, *Const. Hist.* ch. VI.

[5] 9 St. Tr. 818; Foster, p. 198. See also *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).

2. Violating the King's consort, their eldest daughter unmarried, or the wife of their eldest son and heir.

It seems illogical to bring in the daughter, since the wives of younger sons are omitted; hence all reference to her was left out in the Draft Criminal Code of twenty years ago.

A sufficient "violating" may take place even by consent. And the executions, in Henry VIII.'s reign, of two queens, Anne Boleyn and Catherine Howard, serve to shew that the royal lady, who consents to her paramour's addresses, shares the full guilt of his treason.

3. Levying war against the King in his realm.

"War," here, is not limited to the true "war" of international law[1]; but will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a "general" character, *e.g.*, to release the prisoners in *all* the gaols. It is not essential that the offenders should be in military array or be armed with military weapons[2]. It is quite sufficient if there be assembled a large body of men, who intend to debar the Government from the free exercise of its lawful powers and are ready to resist with violence any opposition[3].

This kind of treason is therefore distinguishable from a mere riot[4] by nothing but the "generality" of the object which is aimed at by those taking part in it. Thus the Edinburgh rioters in the Porteous case of 1736[5], rendered familiar to English readers by Sir Walter Scott's *Heart of Midlothian*, were, after mature consideration, prosecuted only for riot, and not for treason; inasmuch as, though they

[1] Dr T. J. Lawrence's *Principles of International Law*, Part III. ch. I.; Wheaton's *International Law*, § 295.

[2] Foster 208.

[3] *Reg.* v. *Dowling*, 7 St. Tr. (N. S.) 460; cf. 32 St. Tr. 3.

[4] *Infra*, pp. 280—286.

[5] 17 St. Tr. 993; Lord Stanhope's *History of England*, ch. XVII.

sought to interfere with the Crown's prerogative of mercy, they resisted merely its being exercised in the particular case of the detested Captain Porteous, and not the general exercise of it. "It is neither the numbers concerned, nor the force employed, but the object which the people have in view, that determines the character of their crime; which will be a riot or a treason, according as this object is of a private and local or of a public and general character[1]." Thus in *Damaree's Case*[2], in Queen Anne's reign, a riotous tumult with the object of demolishing all accessible Nonconformist meeting-houses was held to amount to a treason; on the ground that it was to be regarded as a public resistance to the Toleration Act (which had legalised such meetings) and an attempt to render it ineffectual by numbers and open force. Hence, although the rioters were strong partisans of the Queen and imagined themselves to be serving her interests and advancing her policy, they were, by construction of law, guilty of treason against her.

It will be noticed that the levying of war must be "in the realm"; so that enlisting men, even within the realm, to go to the aid of the King's enemies in military operations to be carried on abroad, will not be punishable under this section[3]. It is, however, punishable under both section 1 and section 4.

4. Adhering to the King's enemies in his realm[4], by giving to them aid and comfort in the realm or elsewhere.

"Enemies," here (unlike "war" in section 3), is to be taken in the strict sense which international law puts upon the word; and accordingly includes none but true public

[1] *Rex* v. *Hardie*, 1 St. Tr. (N. S.) 624. Cf. *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374). [2] Foster 213; 15 St. Tr. 521 (K. S. C. 370).

[3] "Even the actual enlistment of men to serve against the Government, does not amount to levying of war. To constitute it, there must be an actual *assembling* of men for a treasonable purpose." *Per* Marshall, C. J., 4 Cranch (U.S.A.), at p. 126.

[4] These three words seem surplusage; *Rex* v. *Lynch*, 20 Cox 477.

belligerents[1]. Hence to assist mere rebels or pirates does not constitute any offence under this section[2]; though if the assistance were rendered within the realm it would be a sufficient "levying of war" under section 3[3].

5. Slaying the Chancellor or the Treasurer or the King's justices, when in their places doing their offices.

6 and 7. The statute also contained two further sections, now repealed, which made it treason to counterfeit the King's great seal or his privy seal, or his money.

These two offences were reduced to felony by statutes passed in 1832[4].

But by statutes of Anne, which are still in force, two further species of treason have been created, viz.:—

(*a*) To attempt to hinder the succession to the Crown of the person entitled thereto under the Act of Settlement[5];

(*b*) To maintain in writing the invalidity of the line of succession to the Crown established by the Act of Settlement[6].

To this summary of the statute law of treason, we must add an account of what is almost equally important—the extraordinary extension of its scope by the interpretations which the judges of the seventeenth and eighteenth centuries, from political sagacity rather than from logical necessity, placed upon the simple language of the ancient Parliament of Edward III.

The original idea of high treason was, as we have seen, that of a breach of the personal loyalty due to the lord paramount of the realm from each of his vassals. Thus an alien, who had never been even resident in our realm, could not

[1] Wheaton's *International Law*, ed. Boyd, § 124 *b*. [2] 3 Co. Inst. 11.

[3] In Natal, it was held in 1901 that by serving the Boer forces even as a cook, a man gave them "aid and comfort."

[4] 2 and 3 Wm. IV. c. 123; 2 Wm. IV. c. 34, s. 1. *Supra*, p. 263.

[5] 1 Anne, st. 2, c. 21, s. 3. [6] 6 Anne, c. 41, s. 1.

commit treason; for clearly he was under no duty of allegiance[1]. Hence when a charge of adultery was made, in Parliament, against the Queen of George IV., it was pointed out that it did not amount, as in the case of Henry VIII.'s wives, to a charge of participation in treason; for the acts alleged against Queen Caroline were supposed to have been committed abroad with a paramour (Signor Bergami) who was an alien and had never resided in British territory.

And this rule still remains in force. No alien falls within the law of treason unless, by coming into this realm and so obtaining the benefit of the King's protection, he has placed himself under the consequent obligation of rendering him an allegiance, though only a local and a temporary one[2]. And even then, as his duty—unlike the lifelong obligation of the King's own subjects—is only temporary, it has sometimes been urged that it does not necessarily continue throughout the whole of his residence, but only for so long as the King's protection continues to be actually effective. Hence when British territory, where a Boer had for ten years resided, passed into the military occupation of his own State's forces, and he thereupon took service with them, it was argued that the withdrawal of the British troops had dissolved his British allegiance and that his subsequent conduct was therefore no treason against the King. But the Judicial Committee[3] overruled this contention; pointing out that, so soon as the invaders were expelled, the King's courts gave redress for any wrongs sustained during the hostile occupation, and that the King's protection was

[1] *Tucker's Case*, 2 Salk. 632.

[2] 1 Bl. Comm. 457; Foster 183; *Rex* v. *Maclane*, 26 St. Tr. 721. This temporary allegiance by domicile, insisted on in many South African trials, is due (Forsyth's *Cases and Opinions*, p. 200) from every subject of a friendly State who enters our dominions, even though he avowedly come for hostile purposes alone. See *Rex* v. *Lynch*, L. R. [1903] 1 K. B. 444, for the converse case, that of the Englishman naturalized in a hostile State.

[3] *De Jager* v. *Att. Gen. of Natal*, 23 T. L. R. 516. [May, 1907.]

therefore a continuous one. It would be intolerable if, immediately upon an enemy's taking possession of a county, the aliens resident within it could join him with impunity. A small invading force might thus become an army.

The historical development of our nation tended steadily, century after century, to make a consciousness of the importance of the stability of public order—rather than the feudal feeling of mere personal loyalty to a prince—become the binding force of the body-politic. This new conception of civic duty rendered necessary new provisions for its legal enforcement. The criminal law had to begin to take cognizance of politicians who, whilst devoted to the reigning King, were nevertheless disturbing the order of the realm; though possibly only by assailing those institutions whereby the constitution had set a check upon the King's powers. It is a remarkable instance of the activity of judicial legislation that the important legal development, thus rendered necessary, was effected not by Parliament, but by the judges. They transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as "armed resistance, made on political grounds, to the public order of the realm[1]." This new idea they evolved out of Edward III.'s statute by violent interpretations of the language of the 1st and 3rd sections. Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him; because, as Machiavelli had observed, "between the prisons and the graves of princes the distance is very small[2]." And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to shew a compassing of his death; though he were thousands of miles away from the scene of all the disturbances[3]. So, again, the overt act of inciting foreigners to invade the kingdom, *i.e.*, of compassing the levying of war,

[1] Stephen's *General View*, 1st ed. p. 36.

[2] Foster, p. 196.

[3] *Rex* v. *Maclane*, 26 St. Tr. 721.

an offence which the statute does not mention, was held to constitute an overt act towards compassing the King's death[1]. Similarly, as we have seen, a levying of war against any general class of the King's subjects was held—by a construction which Hallam[2] pronounces to be "repugnant to the understandings of mankind in general and of most lawyers"—to be a levying of war against the King himself; as in the case of riots for the purpose of pulling down all public houses or all inclosures of commons, or of forcing all the employers in a particular trade to raise the rate of wages[3].

These interpretations were often violently artificial, almost setting the statute of Edward aside by their forced constructions, and accordingly they were viewed with jealousy by the public at large—a jealousy which found expression in the verdicts of jurymen. Thus when, for his share in the No-Popery riots of 1780, Lord George Gordon was indicted for the treason of constructively "levying war[4]," the acquittal which he secured, whilst fully justified by the facts of the case, was facilitated by the popular dislike to strained interpretations of the law[5]. Not long afterwards, Hardy, Horne Tooke and Thelwall were in 1794 indicted for a constructive compassing of the King's death[6]. The doctrine which was laid down at these trials, as to constructive treasons, was of an extreme character, carrying its "construction" of Edward III.'s statute to (in Hallam's opinion) "a length at which we lose sight of the plain meaning of words[7]." The verdicts of acquittal shewed that such judicial legislation would serve only to defeat its own end. Direct legislation had obviously become necessary. Accordingly the Parliament at once enacted, in 1795, a statute expressly recognising as treason the most important of the constructive treasons; (*e.g.*, the

[1] *Lord Preston's Case*, 12 St. Tr. 646, Foster 196.
[2] *Constitutional History*, ch. XV.
[3] Foster 211.
[4] 21 St. Tr. 485.
[5] Campbell's *Lives of the Chief Justices*, ch. XXXVIII.
[6] 24 St. Tr. 199; 25 St. Tr. 1.
[7] *Constitutional History*, ch. XV.

manifesting any intention to depose the King, or to incite an invasion of the realm, or to levy war against even a House of Parliament to change its policy[1]). This act was not expressly declared to extend to Ireland. After the Irish agitation of 1848, a further statute (11 Vict. c. 12) extending to Ireland was passed; which reduced those constructive treasons dealt with in George III.'s statute (except some which really affected the person of the Sovereign), to mere felonies, so far as regarded the operation of the Act of 1795. They have no statutory name; but are commonly known as "treasonable felonies" or "treason-felonies." The maximum punishment for them is penal servitude for life. This change in the punishment rendered it much easier to prosecute these crimes with success. For juries, naturally, are extremely reluctant to convict persons of good character for offences which, however gravely injurious to the community, involve no ethical guilt and yet are punished with death.

But it is important to notice that these Acts of 1795 and 1848 left untouched the statute of Edward III. and the judicial constructions of it; and that, consequently, it is still open to the Crown in such cases to proceed against the offender for a constructive treason instead of on the lighter charge of a treason-felony[2]. That precisely the same action should thus occupy, simultaneously, two different grades in the scale of crime is indeed a singular juridical anomaly.

As treason was, of all crimes, that in which the Crown had the strongest direct interest in securing the conviction of an accused person, it was the one in which a public prosecutor or a subservient judge had most temptation to conduct the trial so as to press harshly upon the prisoner. The reigns of the Stuarts had afforded so many instances of

[1] An excellent account of the controversy as to constructive treason will be found in chaps. CLXXVII. and CLXXX. of Lord Campbell's *Lives of the Chancellors*.

[2] 11 Vict. c. 12, ss. 6, 7. See 54 and 55 Vict. c. 67, abrogating the merely oral treason-felonies.

this harshness that, after the Revolution of 1688, the legislature introduced great innovations into the course of criminal procedure so far as trials for treason were concerned; and, as Erskine says, "met the headlong violence of angry Power by covering the accused all over with the armour of the Law." By the 7 and 8 Wm. III. c. 3 it was provided that a prisoner accused of high treason should have a right to receive (1) a list of the intended jurors[1], (2) a copy of the indictment, and to make defence by (3) counsel learned in the law, and (4) witnesses. And another clause, (re-enacting and strengthening an enactment of Edward VI.[2]) made necessary (5) a technical minimum of proof; by providing that the prisoner should not be convicted unless either he voluntarily confessed in open court or his guilt were established by *two* witnesses, deposing either to the same overt act, or at least to separate overt acts of the same kind of treason. And (6) it enacts that treason can only be prosecuted within three years from its commission; unless it were committed abroad, or consisted of an actual plot to assassinate the Sovereign (not a mere technical "compassing the death"). (These rules—except nos. (3) and (4)—have not been extended to treason-felony; an omission which creates additional causes for the greater facility of obtaining a conviction for that crime than for treason.)

Treason, like all felonies, was punished with death. But the execution of a traitor was accompanied with special circumstances of horror, to mark the supreme heinousness

[1] To which 7 Anne, c. 21, s. 14 adds a list of the intended Crown witnesses.

[2] 1 Edw. VI. c. 12, s. 22. Hence when a treason had been committed, but the Crown could obtain only a single witness, the only mode of punishing the offender was either to prosecute him for the mere misdemeanor of sedition—as in the case of Hampden [9 St. Tr. 1053] (the grandson of the great opponent of illegal taxation) who took part in the Rye House Plot—or to attaint him by an *ex post facto* Act of Parliament, as in the case of Fenwick [13 St. Tr. 537], who plotted the assassination of William III.

of his crime[1]. Instead of being taken in a cart to the scaffold, he was drawn to it on a hurdle, hanged only partially[2], cut down alive and then disembowelled, beheaded and quartered. The head and quarters were permanently exposed in some conspicuous place[3]; after being boiled in salt to prevent putrefaction, and in cummin seed to prevent birds pecking at them. But the form of sentence in treason was not quite invariable[4], and the King often remitted everything except the beheading. In later times, even where there was no such remission, the executioner usually took it upon himself to make the strangulation fatal. At last it was enacted, (in 1790[5] and 1814[6] as regarded female and male traitors respectively), that the beheading and quartering should not take place till after the prisoner had been put to death by the hanging. And finally in 1870 by the Forfeitures Act[7] all the exceptional features of execution for treason were abolished, except in cases where quartering or beheading may be ordered by royal warrant. For by the Act of 1814[8] the Crown has still power to order, by warrant under the sign manual, that any male who has been sentenced to be hanged for treason shall be beheaded. The judge, however, cannot appoint any mode of death but hanging. In treason, (as in all capital crimes except murder), the common law rule which requires executions to take place in public is still in force.

A penalty which was entailed at common law by all capital crimes, and which sometimes was more dreaded than

[1] See Stephen, *Hist. Cr. Law*, I. 476—7; Pollock and Maitland, I. 499.

[2] The regicide Harrison rose and struck the executioner *after* his bowels had been cut out (5 St. Tr. 1237).

[3] Dr Pusey's mother, who survived until 1858, could remember seeing on Temple Bar the head of one of the rebels of 1745.

[4] The grossest may be seen in 3 Hargrave's State Trials, 340, 409, and in Comberbach's Reports, 257.

[5] 30 Geo. III. c. 48, s. 1.

[6] 54 Geo. III. c. 146, s. 1.

[7] 33 and 34 Vict. c. 23.

[8] 54 Geo. III. c. 146, s. 2.

that of death, was the loss of all the offender's property, and the consequent ruin of the fortunes of his family. But in treasons his landed estate was not disposed of in the same way as in felonies. For in cases of treason, as we have already seen, not only the personal but also the real estate was forfeited to the Crown absolutely[1]. But in case of felonies, the realty was forfeited to the Crown for no longer than the offender's life and a year afterwards; after which period his estate (if in fee simple and not of gavelkind tenure) escheated at common law to the lord from whom it was held.

There had been no trial, in England or Wales, for a treason since 1882, (or for a treason-felony since 1885), until Lynch[2] was tried for treason, on Jan. 21, 1903.

MISPRISION OF TREASON.

In our account of the law of Principal and Accessory[3] we saw that, when a treason has been committed, anyone who knowingly receives or assists the traitor, so as to aid him in escaping from justice, becomes himself guilty of complicity in the past act of treason as a "principal after the fact." And, in the case of felonies, a corresponding rule renders a similar harbourer an "accessory after the fact" to the original felony. We may now add that, even where no active assistance is thus given to the person who has committed a treason or a felony, anyone who knows of his guilt, and can give information that might lead to his arrest, will commit an offence if he omits to communicate that information to some justice of the peace. The "misprision" (*i.e.*, high misdemeanor) of thus concealing a treason, or a felony, is usually termed briefly "misprision of treason" or "misprision of felony[4]." There is

[1] See 1 Hale P. C. c. XXIII.

[2] L. R. [1903] 2 K. B. 444. [3] *Supra*, pp. 88, 88.

[4] The word Misprision was formerly in use as a general name for any of the more heinous kinds of misdemeanors (4 Bl. Comm. 119); but it has now become obsolete except in the two offences now mentioned; where it probably means "undervaluing" the crime concealed.

some authority[1] for saying that a misprision may also be committed in the case of a treason or felony that is merely being planned, if anyone who knows of the design refrains (however much he may disapprove of the project) from disclosing it to a justice of the peace in order to prevent its accomplishment[2]. If he go so far as to give actual assent and encouragement to the plot, he may of course become guilty, not of this mere misdemeanor, but as an accomplice in the felony or treason itself, should the design be ultimately carried into effect[3]. A misprision of felony is punishable with imprisonment and fine; but a misprision of treason with imprisonment for life and the forfeiture of the offender's goods absolutely and of his lands for so long as he lives.

In the case of mere misdemeanors there is no similar crime in omitting to disclose the fact of their having been committed or planned. But in the case of all crimes, even[4] of misdemeanors, it is an offence to "compound" them; *i.e.*, to enter into a bargain to abstain from prosecuting the offender who has committed a crime. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and have no concern with the crime[5].

PRAEMUNIRE.

Akin in nature to treason, though far less heinous in degree, are the miscellaneous offences which have become

[1] 2 Hawkins P. C. c. 29, s. 23; cf. Bishop's *Criminal Law of U.S.A.*

[2] For the wider duty imposed in India, including even that of answering questions put by the police, see the Indian Penal Code, s. 44.

[3] 5 St. Tr. 553.

[4] According to the more recent view; see Archbold (Preface, p. x).

[5] *Reg.* v. *Burgess*, L. R. 16 Q. B. D. 141.

grouped together under the name of Praemunire. Under this head are comprised a variety of crimes whose chief connexion lies in their having the same punishment. But all the earlier offences so punished were, as some of the later also are, acts tending to introduce into the realm some foreign power (usually that of the Pope), to the diminution of the King's authority. The word "praemunire" was the name of the writ which commenced the proceedings against a person guilty of such an offence; but afterwards it was also applied to any statute that created an offence for which this writ was to be issued; and, still later, it came to be applied to the punishment appointed for such offences, and even to the offences themselves[1].

The voluminous collections of our State Trials contain only one English instance of any proceedings under any Statute of Praemunire; viz., that of some Quakers who refused to swear allegiance to Charles II.[2] The principal offences of praemunire still recognised in our criminal law are the following:—

(1) By 25 Henry VIII. c. 20, the refusal of a dean and chapter to elect to a bishopric the clergyman nominated to them by the King.

(2) By the Habeas Corpus Act (31 Car. II. c. 2), the unlawful sending of any prisoner outside the realm, so that he would be beyond the protection of the writ of Habeas Corpus.

This offence is not only made a praemunire, but, as we have seen, even the Crown's power to pardon it is taken away[3].

(3) By 6 Anne, c. 23, s. 9, if the Scotch peers when met to elect their representative peers to the House of Lords discharge any further business they commit a praemunire.

[1] 4 Bl. Comm. ch. VIII.

[2] 6 St. Tr. 201. There is also one Irish case, 2 St. Tr. 558.

[3] *Supra*, p. 15.

The offence of praemunire is only a misdemeanor; yet it is punished more severely than most felonies. For the offender (*a*) is placed out of the King's protection, *e.g.*, he cannot sue; (*b*) he is imprisoned for life; and (*c*) he forfeits to the Crown all his property, real as well as personal, absolutely. This forfeiture is pronounced expressly, as a part of the sentence; and consequently does not render the offence a felony[1], and is not removed by the "Forfeitures Act, 1870."

OFFENCES AGAINST THE PUBLIC PEACE.

In reviewing the law of treason, we have seen[2] that the extension of that crime by judicial constructions has enlarged its scope so as to include many acts which would seem to fall more naturally under the head of the much less heinous offence of Rioting. This offence itself is also one of a very wide and elastic character. This comprehensiveness is probably due (like the severity of the law of Conspiracy[3]) to the weakness which characterised our constitutional provisions for the prevention of crime throughout the long period that elapsed, after the decay of the old system of corporate responsibility by Frankpledge[4], before the establishment by Sir Robert Peel of our modern force of borough and county police. Throughout these intervening centuries, the law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect by very comprehensive prohibitions of all such crimes.

Hence it was laid down that whenever so many as three persons meet together for any purpose which is likely to involve violence or to produce in the minds of their neighbours any reasonable apprehensions of violence, then even

[1] *Supra*, p. 92.
[2] *Supra*, p. 272.
[3] *Infra*, ch. XVIII.
[4] *Supra*, p. 29.

though they ultimately depart without doing anything whatever towards carrying out their design, the mere fact of their having thus met will constitute a crime. It will be the indictable misdemeanor of Unlawful Assembly[1]. Such an offence would therefore be committed as soon as three labourers collect in a cottage of one of them, with a view to a night's poaching, or to attending service in the village church and protesting turbulently against the mode in which it is conducted, even though they never actually start on their expedition. Similarly, a group of people who have come together to see a prize-fight constitute an unlawful assembly, even though the fight never takes place[2]. The offence is sometimes defined so widely as to include all cases where three or more persons are assembled for any unlawful purpose whatever, even though it be one that can cause no fears of violence; and no actual decision can be quoted which discredits this more comprehensive conception of the offence. But it has been called in question by Sir James Stephen[3] and by Lord Brampton; who regard as essential the limitation of the offence to assemblies that, in the old phrase, tend "in terrorem populi." If so, when three boys meet to play pitch-and-toss on a common, or when three costermongers go into a street on Sunday morning to sell their vegetables contrary to the Lord's Day Act, they would not constitute an unlawful assembly, though they may be guilty of an indictable conspiracy[4].

In this offence, as in all others, the law regards persons as responsible for the natural consequences of their conduct. Consequently if persons have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which

[1] 3 Coke Inst. 176; 4 Bl. Comm. 146.

[2] *Rex* v. *Brodribb*, 6 C. and P. 571; cf. *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534.

[3] *Dig. Cr. Law*, Art. 75. Cf. *Beatty* v. *Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392).

[4] *Infra*, p. 289.

it came together involved neither violence nor any other illegality. "You must look not only to the purpose for which they meet, but also to the manner in which they come, and to the means which they are using[1]." Accordingly the idea of an unlawful assembly is not restricted to gatherings met together for the commission of some crime (like the poachers or prize-fighters already mentioned), or for arousing seditious feelings, or for inciting to some breach of the law (such as the non-payment of rents). For however innocent may be the object for which a meeting is convened—*e.g.*, to support some Parliamentary measure by strictly constitutional means—it will nevertheless become an unlawful assembly if the persons who take part in it act in such a way as to give firm and rational men, who have families or property to protect, reasonable ground for fearing that some breach of the peace will be committed[2]. Mere numbers alone, it is true, will not suffice to make an assembly unlawful; but they are a circumstance to be considered. And a marked absence of women and children[3] from a crowd, or an unusually late hour of meeting, or any seditious tone in the speeches, any menacing cries or banners, any carrying of weapons, are similarly circumstances which must be taken into account in determining whether a meeting is such as might reasonably inspire terror in a neighbourhood. But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably[4], the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully, and thereby to create a breach of the peace, does not render their assembly an unlawful one. A man cannot be convicted for doing a lawful act, merely because he knows that his doing it may cause some one else to do an unlawful act[5].

[1] *Per* Bayley, J., in *Reg.* v. *Hunt*, 1 St. Tr. (N. S.) 171, 435 (K. S. C. 388).

[2] *Per* Alderson, B., in *Reg.* v. *Vincent*, 9 C. and P. 91 (K. S. C. 391).

[3] *Per* Bayley, J., in *Rex* v. *Dewhurst*, 1 St. Tr. (N. S.) 600.

[4] As to the necessity of this qualification, see *Wise* v. *Dunning*, L. R. [1902] 1 K. B. 167; and Dicey's *Law of the Constitution*, App. v.

[5] *Per* Field, J., in *Beatty* v. *Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392).

The alarm with which the common law viewed unlawful assemblies naturally led to the establishment of the rule that they may be dispersed forcibly, even by private persons acting on their own initiative. The particular degree of force which such persons will be lawfully justified in using, must be determined by the particular necessities of each individual case. But an unlawful assembly—even when accompanied by such further circumstances as aggravate it into a common-law riot—only amounts to a misdemeanor; and therefore, although blows with fists or with sticks may be struck when necessary to suppress it, it will be unlawful to kill any of the rioters or to employ deadly weapons. If, however, the rioters go beyond their mere misdemeanor and proceed to the length of some felonious violence, then even the infliction of death will be permissible in resisting such violence, or in dispersing or arresting the rioters, and the act of killing will be a justifiable homicide. Indeed, so long as those engaged in suppressing the felonious violence act with due care, the accidental killing of even an innocent bystander by the means lawfully employed for the suppression, will amount only to a case of homicide by misadventure.

Closely akin to the offence of an unlawful assembly are some other crimes of tumultuous disorder which are technically distinguished from it. Thus an unlawful assembly developes into a *Rout,* so soon as the assembled persons do any act towards carrying out the illegal purpose which has made their assembly unlawful[1]; *e.g.*, so soon as they actually commence their journey towards the plantation which is to be netted or the field where the fight is to come off. And the rout will become a *Riot,* so soon as this illegal purpose is actually put into effect[2]; *e.g.*, so soon as a hare is netted or a blow is struck. All these three offences are misdemeanors punishable with the common-law penalties of fine and imprison-

[1] 4 Bl. Comm. 146.

[2] 3 Coke Inst. 176; 4 Bl. Comm. 146.

ment; to which, in the single case of riot, it has been provided by statute that hard labour may be added[1].

But from these mere misdemeanors we must pass to a cognate but more modern and more heinous offence; which has no specific technical name but, for distinction's sake, may conveniently be termed a Riotous Assembly. It is the creation of the Riot Act of 1715[2], which was passed in consequence of the riots in many towns that followed the accession of George I. in 1714. It establishes a wiser mode of prosecuting grave tumults than by treating them as treasonable "levyings of war[3]." Under its provisions, whenever an unlawful assembly of *twelve* or more persons do not disperse within an hour after a Justice of the Peace has read, or has endeavoured to read, to them a proclamation (set out in the Act) calling upon them to disperse, they cease to be mere misdemeanants and become guilty of a felony. The maximum punishment for it is penal servitude for life. It is, however, by a departure from the general rule of criminal procedure, provided that no prosecution for this felony can be commenced after the lapse of a year from its commission.

The Riot Act contains an express clause[4] indemnifying any persons who, after the expiration of the statutory hour, may have to use violence for dispersing or arresting the rioters and in so doing may hurt or kill some one. Indeed, such an indemnity was already implied in the provision that, after the lapse of the hour, the rioters' offence should become aggravated into a felony[5]; for this rendered justifiable the employment of any amount of force necessary to suppress this tumultuous felony, *e.g.*, even the infliction of death, as by troops firing upon the crowd. But even whilst the hour is still unexpired the common-law right of dispersion[6] still exists, unaffected by the Riot Act and by the justice's proclamation. Consequently a moderate degree of force may be

[1] 3 Geo. IV. c. 114. [2] 1 Geo. I. st. 2, c. 5.
[3] *Supra*, p. 268. [4] s. 3. [5] *Supra*, p. 96. [6] *Supra*, p. 283.

lawfully used even then. And if the rioters should proceed to commit any felonious violence, they may be checked with the same extreme measures of force as if the statutory hour were over. But a misapprehension that the Riot Act had somehow impliedly modified the common-law right, did at one time prevail; and sometimes led to grave disorder being allowed to rage unchecked. In 1780, for instance, in consequence of this misapprehension, London was abandoned to pillage for three days, during the disturbances initiated by Lord George Gordon[1]. Neither the citizens nor the soldiers dared to fire upon the plundering incendiaries who had become masters of the metropolis, because no magistrate was present to "read the Riot Act." Their timidity was doubtless enhanced by the verdict of murder which had been given at Edinburgh in 1736 against Captain Porteous[2], and by the indictments which had been found in 1768 against the soldiers who fired upon the Wilkite rioters in London[3]. But the result of the Gordon riots was[4] to make it clear, beyond doubt, that every citizen—and the armed soldier, no less than any other—has by common law the right and the duty of using even deadly violence, whenever it is indispensable for the purpose of protecting person and property against a felonious mob of rioters. For, in Lord Mansfield's phrase, "whether the citizen's coat be a brown one or a red," it is equally his duty to aid the law. This principle is vividly recognised in the present Army Regulations; which (whilst providing that, if a magistrate be present, the officer in command of the troops should not fire without the magistrate's orders) direct that if no magistrate be present, the officer

[1] See Dickens' *Barnaby Rudge*, chs. LXIII—LXVII. [2] *Supra*, p. 268.

[3] Of those Wilkites, a certain stout-hearted Mr Green, with the help of his equally courageous maidservant, slew no fewer than eighteen, when they attacked the little alehouse which he kept. He was tried for murder, and acquitted; but seven of his antagonists were hanged. Knight's *Popular History of England*, VI. 291.

[4] Lord Campbell's *Lives of the Chief Justices*, ch. XXXVIII.

need not wait for one before taking active steps to prevent outrage upon persons or property[1].

The matter, indeed, is not merely one of right, but of duty. It is an indictable misdemeanor for any person to refuse to take part in suppressing a riot, when called upon to do so by a justice of the peace or by a constable. And the duty of the justice of the peace himself goes further. It is incumbent on him to proceed to the scene of a riot, and to read the statutory proclamation if the riot be such as to require it, and to take whatever subsequent steps are necessary to disperse the rioters. If he fail to do this, he is guilty of a criminal neglect of duty, unless he can shew that he has at least done all that a man of firm and constant mind would have done under the circumstances[2].

[1] An admirable account of the law as to the suppression of riots will be found in the Report of the Committee appointed to inquire into the Featherstone Riots of 1893. See *The Times* of December 8th, 1893.

[2] *Rex* v. *Kennett*, 5 C. and P. 283 (K. S. C. 396); *Rex* v. *Pinney*, 3 St. Tr. (N. S.) 11.

CHAPTER XVIII.

CONSPIRACY.

CONSPIRACY[1] is the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it. This definition presents three points for notice:—(1) the act of agreement, (2) the persons agreeing, (3) the purpose agreed upon.

(1) *The Agreement.* It must not be supposed that conspiracy is a purely mental crime, consisting in the mere concurrence of the intentions of the parties. Here as everywhere in our law, bare intention is no crime. "Agreement," as Lord Chelmsford puts it clearly, "is an act in advancement of the intention which each person has conceived in his mind[2]." It is not mere intention, but the announcement and acceptance of intentions. Bodily movement, by word or gesture, is indispensable to effect it. In order of time, it comes intermediate between the intention and the act agreed upon. But the mere fact of the parties having come to such an arrangement suffices to constitute a conspiracy[3]. Hence it is not necessary to shew that they went on to commit some overt act towards carrying it out[4]; though this would be necessary in an action of Tort for conspiracy[5]. It follows

[1] Stephen, *Hist. Cr. Law*, II. 227—229.

[2] *Mulcahy* v. *The Queen*, L. R. 3 H. L., at p. 328; cf. Irish L. R. 1 Q. B. 12.

[3] *Rex* v. *Gill*, 2 B. and Ald. 205 (K. S. C. 398).

[4] *Rex* v. *Eccles*, 6 T. R. 628.

[5] *Mogul Steamship Co.* v. *McGregor*, L. R. 21 Q. B. D., *per* Lord Coleridge, C.J., at p. 549. See Pollock on Torts, 6th ed. p. 313.

that a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it[1]. Thus if two lovers agree to commit suicide together, but promptly think better of it, they nevertheless are liable to an indictment for conspiracy. On the other hand the actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become "merged" in it. Hence it would be technically possible to bring an indictment for a mere conspiracy to commit some grave crime, and then support it by evidence that tends to shew an actual consummation of the crime; but judges sternly discourage such a course as unfair to the accused[2].

(2) *Two persons.* The very name of the crime indicates that it is essentially one of combination; a man cannot by himself *con*-spire. Moreover, the law applies here the old doctrine of conjugal unity, reckoning husband and wife as one person; so that an unlawful combination by him and her alone does not amount to a conspiracy[3]. But though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. One person may be indicted, alone, for conspiring with other persons who are not in custody, or who are even unknown to the prosecutor[4].

(3) *An unlawful purpose.* The term "unlawful" is here used in a sense which is unique[5]; and, unhappily, has never yet been defined precisely. The purposes which it comprises appear to be of the following species:—

(i) Agreements to commit a substantive crime[6]; *e.g.*, a conspiracy to steal, or even merely to incite some one else to

[1] *Rex* v. *Gill*, loc. cit.
[2] *Reg.* v. *Boulton*, 12 Cox 87.
[3] 1 Hawkins P. C. c. 72, s. 8.
[4] *Rex* v. *Kinnersley*, 1 Strange 193.
[5] Contrast its sense in the Vagrant Act, *infra*, ch. XXIII.
[6] *Reg.* v. *Davitt*, 11 Cox 676 (K. S. C. 380).

steal. This extends to all cases where it would be criminal for any of the conspirators to commit the act agreed upon; even though there be in the gang other persons in whom it would be no offence to commit it; and to all 'crimes' however trivial[1].

(ii) Agreements to commit any tort that is malicious[2]. It has sometimes been supposed that agreements to commit any tort, of whatever kind, are indictable as conspiracies. But the weight of authority seems to be in favour of limiting the rule to malicious torts; thus excluding, for instance, a trespass committed *bonâ fide* by persons eager to assert their supposed right of way.

(iii) Agreements to commit a breach of contract under circumstances that are peculiarly injurious to the public[3].

(iv) Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all. but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public. We may quote, as familiar instances, agreements to facilitate the seduction of a woman[4]; or to run slackly in a race so as to enable a confederate to win his bets[5]; or to hiss a play unfairly[6]; or to raise by false reports the price of the Funds[7]; or so to carry on trade as to diminish the revenue[8]. On the other hand, it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy[9]. And it is now settled,

[1] *Reg.* v. *Whitchurch*, L. R. 24 Q. B. D. 420. Cf. p. 281 *supra*; and Lord Campbell's "If two men agree to blow their noses together during Divine service so as to disturb the congregation, they may be indicted for conspiracy," (Hansard, March 1, 1859).

[2] *Reg.* v. *Druitt*, 10 Cox 592.

[3] *Vertue* v. *Lord Clive*, 4 Burrows 2473 (K. S. C. 401).

[4] *Rex* v. *Lord Grey*, 9 St. Tr. 127.

[5] *Rex* v. *Orbell*, 6 Mod. 42.

[6] *Gregory* v. *Duke of Brunswick*, 6 Man. and Gr. 205.

[7] *Rex* v. *De Berenger*, 3 M. and S. 67, (the trial of Lord Dundonald, the naval hero); cf. *Rex* v. *Brailsford*, L. R. [1905] 2 K. B. 730.

[8] *Rex* v. *Starling*, 1 Siderfin 174 (K. S. C. 403).

[9] *Rex* v. *Lloyd*, 4 Esp. 200; *Rex* v. *Levy*, 2 Starkie 458.

after some conflict of opinion, that there is nothing illegal in a "knock out," *i.e.*, a combination among dealers to abstain from bidding against one another, and afterwards to redistribute amongst themselves the goods so underbought[1]. And a combination to procure the marriage of two paupers, in order to relieve the ratepayers of the charge of the woman's maintenance, is not a conspiracy[2]. Yet some combinations for procurement of marriage will amount to conspiracy; *e.g.*, taking a young woman of property from the custody of her relations in order to marry her to one of the conspirators[3]. And although all combinations "in restraint of trade" are so far illegal as to be unenforceable[4], it is now settled that they do not necessarily constitute a criminal offence. Some, at least, of them did so in the older common law; as, for example, any combination of employed or employers that affected the rate of wages, (such as that of the journeymen tailors of Cambridge who were successfully indicted in 1721 for combining to refuse to work below a certain rate of payment[5]). But by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), no combination for the doing of any act "in furtherance of a trade dispute between employers and workmen" is any longer to be indictable, unless the act contemplated be one which is in itself a crime—and moreover a crime punishable with imprisonment—even when committed by one person alone.

The vagueness of the definition of this fourth class of "unlawful" purposes—to say nothing of the minor uncertainties hanging over the second and third classes—is historically intelligible. For in days when our police system was ineffective, the law felt itself dangerously threatened by any

[1] *Heffer* v. *Martyn*, 15 W.R. 890; overruling *Levi* v. *Levi*, 6 C. and P. 239.
[2] *Rex* v. *Seward*, 1 A. and E. 706 (K. S. C. 405).
[3] *Rex* v. *Wakefield*, 2 Lewin 1, cf. *Rex* v. *Thorp*, 5 Mod. 221 (K. S. C. 407).
[4] *Mogul Steamship Co.* v. *McGregor*, L. R. [1892] A. C. 25.
[5] 8 Mod. 11 (K. S. C. 404); cf. *Rex* v. *Hammond*, 2 Esp. 718 (K. S. C. 411).

concert amongst evil-doers; and consequently, in the seventeenth and eighteenth centuries, indictments against conspirators were held good very readily. "A conspiracy," said even Lord Holt, "is odious in the law[1]." But this vagueness renders it possible for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be "unlawful." Owing to this elasticity in the definition of the crime, and also to the unusually wide range of evidence by which (as we shall see) indictments for it may be supported, there is much justification for the language used by Fitzgerald, J., in reference to it, in the Irish State Trials of 1867:—"The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits." For, in the prudent words of the greatest of American judges:—"It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation[2]."

As to the Evidence admissible, the principles are just the same for conspiracy as for other crimes. But, owing to the peculiarity of the circumstances to which they are here applied, there often appears to be some unusual laxity in the modes of giving proof of an accusation of conspiracy[3]. For it rarely happens that the actual fact of the conspiring can be proved by direct evidence; since, naturally, such agreements are usually entered into both summarily and secretly. Hence they ordinarily can only be proved by a mere inference

[1] 5 Mod. 408. [2] *Per* Marshall, C.J., in *Ex parte Bollman* (4 Cranch 127).
[3] See *per* Bayley, J., in *Reg.* v. *Hunt*, 1 St. Tr. (N. S.) 437.

from the subsequent conduct of the parties, in committing some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about[1]. The circumstantial evidence thus rendered necessary will often embrace a very wide range of acts, committed at widely different times and in widely different places[2]. The range of admissible evidence is still further widened by the fact that each of the parties has, by entering into the agreement, adopted all his confederates as agents to assist him in carrying it out; and consequently that, by the general doctrine as to principal and agent, any act done for that purpose by any of them will be admissible as evidence against him[3]. Accordingly, evidence must first be given of overt acts committed by each individual, sufficient to shew that he was a party to the conspiracy; and thereupon, as soon as the conspiracy has thus been brought home to them all, any act done in connexion with it by any one of the conspirators will become admissible as evidence against each and all of the others[4]. When a seditious plot gets to the stage at which actual fighting begins, the man who instigated it often beats a retreat; but this prudent conduct will not prevent the blows subsequently struck by his confederates from being legally admissible in evidence against him. The doctrine of evidence here applied is, of course, applicable to all crimes where a plurality of offenders are concerned, and is not peculiar to trials for conspiracy. But in them it is apt to assume unusual prominence; because, in cases of conspiracy, an unusually long interval is likely to elapse between the time when the common criminal purpose is formed and the time when it is carried out.

[1] Cf. *Rex* v. *Brisac*, 4 East 171, *per* Grose, J.; see also *Reg.* v. *Parnell*, 14 Cox 505 (K. S. C. 412), *Rex* v. *Parsons*, 1 W. Bl. 391 (K. S. C. 408).

[2] *Rex* v. *Hammond*, 2 Esp. 718 (K. S. C. 411); *Rex* v. *Roberts*, 1 Camp. 399 (K. S. C. 409).

[3] See this well explained in 7 St. Tr. (N. S.) 472—475.

[4] *Reg.* v. *Shellard*, 9 C. and P. 277.

Conspiracy is a misdemeanor; punishable with fine and imprisonment, to which no limit is affixed. It is also provided by statute[1] that hard labour may be added for the whole or a part of the period of imprisonment, if the object of the conspiracy were to defraud, or to extort money or goods, or to bring a false accusation of crime, or to pervert the course of justice. Moreover a conspiracy to murder is punishable with penal servitude for ten years, though it still remains only a misdemeanor[2].

[1] 14 and 15 Vict. c. 100, s. 29.

[2] 24 and 25 Vict. c. 100, s. 4. *Supra*, p. 98.

CHAPTER XIX.

PERJURY.

IN Anglo-Saxon legal procedure, judicial oaths played a very important part, being taken both by jurors and by compurgators. Both these classes were punishable for any perjury they committed. But the functions of the modern witness had not yet been differentiated from those of the juror; and perjury by witnesses was consequently an unknown crime[1]. And when, in the fourteenth century, witnesses began to be brought in to inform the jury, perjury by them was not made a punishable offence. Hence it became a maxim that the law regarded every witness's oath as true. Even the ecclesiastical courts, though treating breaches of faith in general as matters within their jurisdiction, took no notice of the grave breach of faith involved in giving false witness. But, before the end of the fifteenth century, the Star Chamber sometimes interposed to punish perjuries. And, in the sixteenth century, Parliament itself began to interfere with the immunity of witnesses; dealing in 1540[2] with subornation of perjury, and in 1562[3] with perjury itself. But for each of these offences it imposed only a pecuniary penalty, recoverable civilly by a penal action. Finally, however, the Star Chamber, in 1613, declared perjury by a witness to be punishable at common law[4]. Sir James Stephen emphatically describes this decision as "one of the boldest—and, it

[1] See Pollock and Maitland, II. 539—541; Stephen, *Hist. Cr. Law*, III. 240—250.

[2] 32 Hen. VIII. c. 9, s. 3.

[3] 5 Eliz. c. 9.

[4] *Rex* v. *Rowland*, 3 Coke Inst. 164 (K. S. C. 415).

must be added, one of the most reasonable—acts of judicial legislation on record[1]."

The common law offence of perjury, thus created, consists[2] in the fact that a witness, to whom an oath has been duly administered in a judicial proceeding, gives, upon some point material to that proceeding, testimony which he does not believe to be true. It will thus be seen that false oaths do not always involve a perjury. Yet even when not perjuries, they nevertheless are now treated in law as sometimes constituting an indictable offence; though this will not be the case when (*a*) they are not taken before an official legally authorised to administer oaths, or (*b*) though so taken, they are not of any public concern[3], or (*c*) though of public concern, they are of a merely promissory character.

The definition of perjury presents three points for our consideration: (1) the giving of the false testimony, (2) the tribunal where it is given, and (3) the point to which it relates.

(1) *The False Testimony.* The offence of perjury lies in the taking of a false oath. There is thus only one crime for each such oath; however many may be the lies by which the taker intensifies its falsity. Each further lie that he proceeds to tell under the same oath, is thus not a new perjury, but is merely a fresh proof of the original one, or, in the technical phrase, matter for a new Assignment of perjury. Conversely, the same lie if told on two occasions, under two oaths, will constitute two perjuries; as when the Tichborne claimant, having told his false tale both in the Court of Chancery and also before a jury in a common-law court, had

[1] *Dig. Cr. Law*, 1st ed. p. 345.

[2] See Stephen, *Dig. Cr. Law*, Art. 148; 3 Coke Inst. 164—167.

[3] But as to whether in the case of mere Declarations, made extrajudicially before magistrates under 5 and 6 Wm. IV. c. 62, it is essential to indictability that the false declaration should relate to a matter of importance, the authorities are in conflict; contrast *Reg.* v. *Boynes* (1 C. and K. 65) with *Reg.* v. *Cox* (9 Cox 301).

to undergo a separate term of penal servitude for each of these two offences.

A witness may falsify his oath even though he gives under it no evidence which he actually believes to be false. For, if he deposes to any statement which he does not actually believe to be true, he commits a breach of his oath. Accordingly, if he makes an assertion as to some matter about which he knows nothing at all, he commits perjury. Thus the crime may be committed even by giving evidence which is actually true; for to swear to the truth only by a mere accident is to swear falsely[1].

By the Oaths Act, 1888[2], wherever an oath is required by law, an affirmation may be made in place of the oath by any person who objects to taking oaths, either on account (*a*) of their being contrary to his religious belief, or (*b*) of his having no religious belief. Taking a false affirmation is punished just as a false oath would be in the particular case, *i.e.*, according as it is judicial or non-judicial[3]. But to give false testimony upon an affirmation, even in judicial proceedings, is not technically called a "perjury"; though the two offences incur equally severe punishment.

(2) *The Tribunal.* We have seen that at common law, perjury, properly so called, can only be committed in the course of a judicial proceeding[4]. But this will include the sittings of any court, even though it be not a court of record, *e.g.*, a court of petty sessions, or not even a court of common law at all, *e.g.*, a court martial[5]. But it will not extend to any irregular sittings of even an ordinary court. Thus where the Registrar, who was presiding in a court of Bankruptcy at the examination of the debtor, quitted the room to discharge

[1] 1 Hawkins P. C. c. 69, s. 6.

[2] 51 and 52 Vict. c. 46. An affirmation had already been allowed in place of an oath in all *judicial* proceedings.

[3] *Supra*, p. 295.

[4] *The Keepers of the Liberties of England* v. *Gwinn*, Style 336 (K. S. C. 416).

[5] *Reg.* v. *Heane*, 4 B. and S. 947.

other duties, desiring the solicitor to still go on examining the debtor, false answers given after his departure were held not to constitute a perjury[1]. It is true that, to the common law offence of perjury, which thus can only be committed in a court of justice, some statutory perjuries have been added, which consist in taking a false oath in certain specified non-judicial proceedings, *e.g.*, in business relating to Excise. Apart, however, from these statutory exceptions, the rule is that the taking of a false oath in *non*-judicial proceedings, does not come under the definition of perjury, and so does not incur penal servitude. If, however, the oath were one which was required by law[2] to be taken, it is now settled that the taking of it falsely would constitute a common law misdemeanor. It would be punishable with the ordinary common law penalties of fine and imprisonment; but not with hard labour, or penal servitude, which can never be imposed except for crimes to which (as, for instance, to perjury proper) they have been expressly made applicable by statute.

(3) *The point deposed to.* "De minimis non curat lex." It came to be settled that there is no sufficient perjury in giving false testimony, unless it relates to some point which was "material" to the proceedings before the judicial tribunal[3]. This lenient rule enabled many witnesses, who had wilfully given false evidence, to escape all punishment. But the judges now construe the rule in such a way as to remove much of this immunity. Thus they hold evidence to be sufficiently "material" even though it be material, not intrinsically, but only by its facilitating the jury's acceptance of other testimony which has an intrinsic materiality. For the mere trivial details mentioned by a witness, in giving his account of a transaction, may become important by their leading the jury to believe that his knowledge of the trans-

[1] *Reg.* v. *Lloyd*, L. R. 19 Q. B. D. 215.

[2] *Reg.* v. *Foster*, R. and R. 459 (K. S. C. 417).

[3] 3 Coke Inst. 167; *Reg.* v. *Holden*, 12 Cox 167 (K. S. C. 418).

action is complete, and his evidence therefore likely to be accurate. On the same ground, all statements made by a witness as to matters that merely affect his credibility are material[1], *e.g.*, his denial of having been convicted of a crime[2], or his false account of the circumstances under which he was so convicted. And even if the false evidence were legally inadmissible, as relating to some point about which the witness ought not properly to have been questioned, yet this will not prevent its being regarded as "material" enough to form the subject of an indictment for perjury. There is, for instance, a rule[3] that when a witness answers questions that relate merely to his own credibility, his answers are to be taken as final; so that no other witness can legally be brought to contradict them. Yet if, by a breach of this rule, some second witness be permitted to give this contradiction, and he give it falsely, he may be indicted for perjury; for, though the contradiction was admitted as evidence quite wrongly, yet, so soon as it was admitted, it did affect the credit given to the previous witness, and so became clearly "material[4]."

Having thus defined the essentials of a perjury, we may add, with regard to the evidence necessary to support an indictment for it, that, as a rule, two witnesses are necessary to prove the falsity of the perjured statement which is alleged to have been made falsely[5]. For otherwise there would be but one man's oath against another man's; and the jury would have no sufficient reason for preferring the assertion of the witness for the prosecution to that originally sworn to by the man who now stands accused. (But it is

[1] *Reg.* v. *Baker*, L. R. [1895] 1 Q. B. 797 (K. S. C. 419).

[2] *Reg.* v. *Lavey*, 3 C. and K. 26. [3] *Infra*, p. 358.

[4] *Reg.* v. *Gibbon*, L. and C. 109. Moreover, even when the point to which the evidence relates is *not* material, the witness, by giving it, commits a "contempt of court by Prevarication" (4 Bl. Comm. 281), for which the tribunal, if it be a Court *of Record*, may forthwith commit him to prison, (*Wellesley* v. *Duke of Beaufort*, 2 Russell and Mylne 664). [5] *Infra*, p. 385.

sufficient if only one of the witnesses directly contradicts the prisoner's false statement, and the other merely proves some particular circumstances that corroborate the contradiction, provided that they corroborate it very materially[1].) In the same way, the mere fact that the prisoner is shewn to have sworn to two contradictory statements will not constitute sufficient evidence to justify his being convicted of perjury. "For a person may honestly swear to a particular fact from the best of his recollection and belief, and yet at a subsequent time become convinced (from other circumstances) that he was wrong, and consequently swear to the reverse[2]." Moreover, even if the witness were not swearing honestly on either occasion, there will still remain the practical difficulty that his mere self-contradiction does not suffice to shew which one of his two statements is the false one; and, unless this be known, no indictment can be framed.

Perjury is only a misdemeanor; but by statute it has been made more severely punishable than many felonies, viz. with seven years' penal servitude, or seven years' imprisonment with or without hard labour[3], as well as with a fine.

[1] *Reg.* v. *Hook*, D. and B. 606 (K. S. C. 422).
[2] *Per* Holroyd, J., in *Rex* v. *Jackson*, 1 Lewin 270 (K. S. C. 421).
[3] 2 Geo. II. c. 25, s. 2; 3 Geo. IV. c. 114.

CHAPTER XX.

BIGAMY.

BIGAMY[1], as Blackstone tells us (4 Comm. 163), properly signifies being married *twice*; but in law is used as synonymous with polygamy, or having a plurality of wives at once. (In 1790 a man named Miller was pilloried for having married so many as thirty women, for the sake of getting their money.) It originally was a purely ecclesiastical offence. But in 1603, by 1 Jac. I. c. 11, it was made felony. This statute, after being repealed and re-enacted by 9 George IV. c. 31, is now reproduced in the Offences against the Person Act, 1861 (24 and 25 Vict. c. 100, s. 57).

The offence is committed when a person who—

(1) has previously been married,

(2) and has not since been legally divorced,

(3) goes through a legally recognised ceremony of marriage with another person,

(4) whilst the original wife or husband is still living;

(5) unless the original wife or husband has been continuously absent, from the accused husband or wife, during the seven years preceding the second marriage; and has not during that time been known by him or her to be living.

1. *Previously married.* To sustain an indictment for bigamy the first marriage must have been valid according to the law of the domicil of the parties, so far as concerns their

[1] See Stephen, *Dig. Cr. Law*, Arts. 274—5.

personal capacity to marry; and according to the law of the place of celebration, so far as concerns the ceremonial form.

Amongst possible causes of voidness may be mentioned the fact of either party being an idiot at the time of marriage[1]; or the fact of the parties being within the prohibited degrees of relationship, (as in the case of a man's marriage with his deceased wife's sister[2]); or even the more technical fact that the parties were Protestants and yet went through a form of marriage appropriate for Roman Catholics alone. So too, if the prisoner's first wife were actually the wife of someone else, at the time of her marriage with him, this marriage would necessarily be void; and consequently for him to proceed to marry some other woman will, though apparently a bigamy, be really no crime. Similarly if *X* marries first *A*, and secondly *B*, and then thirdly, after *A*'s death, marries *C*, this marriage between *X* and *C* will not be indictable as a bigamy; inasmuch as the marriage with *B* was a mere nullity[3].

But besides those invalid marriages which are actually void (*i.e.*, which may be treated as null by any court where evidence is given of the circumstances that invalidate them), there are others which are only voidable, (*i.e.*, the cause of their invalidity is merely one for which a court of matrimonial jurisdiction may set aside the marriage, if called upon to do so whilst both the parties are still alive). But, until thus set aside, such a marriage must be treated by all courts as valid. Hence even a voidable marriage, (as where either party to the marriage is sexually impotent[4]), has always been regarded as sufficient to render any second marriage bigamous[5].

2. *Not divorced.* It will be a good defence to a charge of bigamy, if the prisoner prove that the first marriage had

[1] 1 Bl. Comm. 438.
[2] *Reg.* v. *Chadwick*, 11 Q. B. 173.
[3] 1 Hale P. C. 693.
[4] *B. alias A.* v. *B.* 27 L. R. (Ir.) 608.
[5] 3 Coke Inst. 88.

been validly dissolved before the celebration of the second marriage. The divorce must be a legal one; legal, that is, by the law of the country where the divorced parties were domiciled at the time[1]. If it were not thus valid, the fact that, by an error of law, they honestly though mistakenly supposed it to be valid, will not prevent the second marriage of either of them from being criminal. But if valid under that country's law, a divorce will be effectual here as a defence to a charge of bigamy, even though the ground on which it was granted was one that would not have enabled the parties to obtain a divorce in this country, had they then been domiciled here. And even in a case where an Englishman, at a time when he still was domiciled in England, had obtained a divorce in Chicago, and afterwards had re-married there, Butt, J., expressed (in the hearing of the present writer) some hesitation as to whether that divorce, though invalid in England, might not nevertheless bar, even here, an indictment for bigamy; as both the divorce and the re-marriage took place in the same country.

3. *Legally recognised ceremony.*

Bigamy, like homicide, forms one of the rare exceptions to the principle that criminal jurisdiction is purely territorial. For, if the person accused be a British subject[2], it is immaterial in what territory (even though it be outside the British dominions altogether[3]) the second marriage took place; and he may be tried in any part of the United Kingdom where he may be in custody. But a person who is not a subject of His Majesty cannot thus be tried here for a bigamy committed outside the United Kingdom.

The second marriage, (the crime alleged), must have been in a form recognised by the law of the place where it

[1] *Harvey* v. *Farnie*, L. R. 8 A. C. 43; *Le Mesurier* v. *Le Mesurier*, L. R. [1895] A. C. 517.

[2] See the proviso in s. 57.

[3] *Earl Russell's Case*, L. R. [1901] A. C. 446.

was celebrated[1]. But any form, legally recognised there, is sufficient. It is enough that it would have been good on some occasions; notwithstanding its being one which could not have been effectual on that particular occasion, even had the guilty person not been already married. Thus it is no defence for a man, accused of bigamy, to shew that he is a Protestant, and that the form of marriage which he went through at his second wedding was one that is valid for Catholics alone. Nor is it any defence to shew that the parties were too near akin to be able to contract a valid marriage. For the ground upon which bigamy is punished is the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony.

4. *Original spouse still living.* The prosecution must establish the fact that the prisoner's original husband or wife was still living at the time of the second marriage. Still it is not necessary that this should be shewn by the direct evidence of some one who can speak to having seen that person alive at that date. It may be sufficiently established by mere probable inference from circumstances; *e.g.*, from the fact that the prisoner's first wife was alive and well a few days before his second marriage. But the fact of her having been alive merely within the often-cited period of "seven years" before that marriage, will often be utterly insufficient to justify an inference that she was still alive when it was solemnised. For the effect of shewing that she was alive at some time within these seven years is merely to neutralise the presumption[2] of her death. It does not reverse it, and so throw back the burden of proof upon the prisoner. In other words, it simply releases the jury from any technical presumption; and sets them free to look to the circumstances of the particular case. (From the woman's age and health, the climate of the country in which she

[1] *Reg.* v. *Allen*, L. R. 1 C. C. R. 367 (K. S. C. 423). [2] *Infra*, p. 329.

resided, the period which has elapsed since she was heard of, and similar circumstances, they must draw an inference as to whether she did or did not survive until the time when her husband married again[1].)

5. *Not absent for seven years.* It is provided by the statute[2] that it shall be a conclusive defence to shew that the prisoner's original spouse (1) had been continuously absent from the prisoner during the seven years preceding the second marriage, and (2) had never been heard of by the prisoner meanwhile. It does not seem to be necessary that the prisoner should give express proof of both the elements requisite to this defence. For if his wife's continuous absence for seven years be proved, this will suffice to raise a *primâ facie* presumption of her not having been heard of throughout that period[3]. But of course the prosecution may rebut this presumption, by shewing that within the seven years the fact of her being alive had become known to the prisoner. Yet, even when this has been shewn, the jury will still have to determine the further question whether or not the wife remained alive down to the actual time of the prisoner's second marriage; a question which must be determined by consideration of the circumstances of the case, in the manner which we have already suggested.

We now come to a difficulty about which there have been keen controversies. If it be shewn (1) that the prisoner's wife was alive at the time of his second marriage, and (2) that at some time during the seven years preceding the second marriage he had known of her being still alive, must he necessarily be convicted? What if, subsequently to his last hearing of her as alive, he had received authoritative, though mistaken, assurance that she was dead? So far as the mere

[1] *Reg.* v. *Lumley*, L. R. 1 C. C. R. 196.
[2] 24 and 25 Vict. c. 100, s. 57; cf. 1 Jac. I. c. 11, s. 2.
[3] *Reg.* v. *Curgerwen*, L. R. 1 C. C. R. 1 (K. S. C. 426).

language of the statute goes, he undoubtedly has satisfied its definition of bigamy. Yet he may have done nothing which he did not honestly believe, and reasonably believe, to be perfectly lawful. For a long time judges differed in their decisions as to whether such a belief would or would not be a good defence for the re-marrying. But in 1889 it was decided in the Court for Crown Cases Reserved, by nine judges to five[1], that the general principle of criminal law, that a person cannot be guilty of a crime unless he has a guilty mind, is so fundamental that it must override the mere omission of the statute in not expressly including a mental element as an essential requisite in the offence of bigamy. Accordingly the majority of the court held that the prisoner's *bonâ fide* belief, on reasonable grounds, that his wife was dead, would excuse his re-marrying even within the seven years.

As regards the evidence which will be available at the trial, it should be noted that the husbands or wives of accused persons have always been excluded from giving evidence against them. Hence the innocent party to the second marriage cannot give evidence for the prosecution until that second marriage has been shewn to be invalid; for *primâ facie*, that party and the prisoner appear to be man and wife[2]. But so soon as it is proved that the prisoner's original wife is still living, the second wife is shewn to be no wife at all, and, therefore, becomes an admissible witness against him[3]. Yet the first wife, of course, will not be so. But the Criminal Evidence Act, 1898[4], now admits even a husband or wife to give evidence *for* a prisoner.

[1] *Reg.* v. *Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15).
[2] *Miles* v. *United States*, 103 Supreme Court 305.
[3] 1 Hale P. C. 393.
[4] 61 and 62 Vict. c. 36, s. 1.

Bigamy is a felony, punishable with penal servitude for not more than seven years or less than three, or with imprisonment (with or without hard labour) for not more than two years. It is, like manslaughter, a peculiarly "elastic" crime; the degrees of guilt varying, according to the degree of deceit practised, from an offence closely approximating in heinousness to a rape, down to cases in which the parties' only guilt consists in their having misused a legal ceremonial for the purpose of giving a decent appearance to intercourse which they knew to be illicit. Indeed there may even be cases of an undoubtedly criminal bigamy where there is no moral guilt at all. For both parties may have been misled by some very natural misapprehension of law. The great, and unhappily increasing, dissimilarity between the matrimonial laws of civilised nations has made it but too easy for a man and woman to be husband and wife in one country and yet not so in another.

The other party to the bigamous marriage, if aware, at the time, of its criminal character, became guilty of aiding and abetting the crime; and accordingly may be indicted for bigamy as a principal in the second degree[1]. On the other hand, as Mr Justice Wright has pointed out[2], when a woman, who reasonably believes her husband to be dead, marries a man who knows (but conceals) the fact of his being still alive, this man will escape all punishment; for the woman committed no crime, so he cannot be treated as an accessory.

It may be added that where a bigamy is committed, but the other party to the second marriage has no knowledge of its invalidity, she or he may, after the criminal proceedings, bring a civil action to recover damages for the tort of Deceit, which the prisoner committed in pretending to be free to marry[3].

[1] *Reg.* v. *Brawn*, 1 C. and K. 144.

[2] *Draft Criminal Code for Jamaica*, p. 112.

[3] Chitty's *General Practice*, p. xviii.

CHAPTER XXI.

LIBEL.

A LIBEL is such a writing or picture as either defames an individual ("private" libel) or injures religion, government or morals ("public" libel).

We have already seen[1] that most crimes are also torts. But the most conspicuous illustration of this is afforded by the defamatory, or private, Libel. It is a crime which not only is a tort, but is often treated as such in actual practice. For (1) it is only a misdemeanor, and accordingly not affected by the rule which delayed, and therefore usually frustrated, civil proceedings for crimes that were of the degree of felonies. And again, (2) it is a crime which, unlike most others, is often committed by persons whose pecuniary means are large enough to enable them to pay whatever compensation a civil court may award. Libels, indeed, are much more frequently followed up by civil than by criminal proceedings. For the judges of the present day desire to see indictments for defamation restricted to those cases in which the libel is aggravated either by its intrinsic gravity or by its obstinate repetition.

Hence a detailed exposition of the general principles of the law of libel should be sought rather in books on Torts[2] than in those devoted to criminal law. It will, therefore, probably be sufficient for the purposes of the present volume if we indicate very briefly the fundamental principles, which are common to both the civil and the criminal law of libel,

[1] *Supra*, p. 20.

[2] See Pollock on Torts, ch. VII.; Bigelow on Torts, 7th ed. ch. VII.

and then explain the distinguishing features of the latter aspect of this wrong[1]. The following principles are common to both its aspects:—

(I) Anyone who publishes a defamatory document concerning another person, so as to tend to bring him into hatred[2], contempt, or ridicule, is guilty of "publishing a defamatory libel[3]." This "document" may consist of either a written or a pictorial[4] composition (*e.g.*, even of an effigy suspended from a mock gibbet).

(II) The publication need not be "malicious" in the popular sense of that word, *i.e.*, it need not be due to spite, or, as it is called, "express malice." It is true that the Libel Act, 1843, when dealing with criminal libel, does in terms restrict the offence to "malicious publication." But the law draws from the fact of publishing such matter, without any of the recognised legal grounds of excuse, an absolute presumption that the publication was malicious. Hence it is now settled[5] that it is not even necessary for the prosecutor or plaintiff to make in his pleadings any formal allegation that the libel was published maliciously. The law of libel has thus, at last, worked itself free from entanglement with the old fictions of a "constructive malice," which sometimes (as in the case of ardent social or political reformers) was —in Lord Macaulay's words—"only a technical name for benevolence[6]."

[1] See Stephen, *Hist. Cr. Law*, II. 298—395; Stephen, *Dig. Cr. Law*, Arts. 96, 179—183, 291—303.

[2] In one of the United States, it has thus been held libellous to describe a man as "a Tory." With emphatic rhetoric the Supreme Court of Georgia thus ruled the point: "When the name of Washington shall grow cold to the ear of the patriot, when the poles of the earth shall be swung round to a coincidence with the equator, then and not till then will it cease to be a libel" to call a man a Tory; *Giles* v. *The State*, 6 Cobb 284, A.D. 1849.

[3] See *Reg.* v. *Munslow*, L. R. [1895] 1 Q. B. 758 (K. S. C. 432).

[4] *Monson* v. *Tussauds*, L. R. [1894] 1 Q. B. 671.

[5] *Reg.* v. *Munslow*, supra.

[6] *Miscell. Works*, IV. 189.

(III) Everyone who circulates, or authorises the circulation of, a libel is *primâ facie* regarded as publishing it[1]. But if he can be shewn to have been a mere unconscious instrument, (as, for instance, is generally the case with a newsboy), this will be a sufficient defence[2]; some mental element being necessary to constitute such an act of "publication" as will render the doer responsible for it.

(IV) The defamatory meaning which the document is alleged to have conveyed must be one:—

(i) which it was reasonably capable of conveying to ordinary people[3], and

(ii) which it actually did convey to the particular person to whom it was published.

(V) There are certain occasions upon which the publication of (what would on ordinary occasions be) a libel becomes privileged. Such a privilege may be either,

(*a*) *Absolute; e.g.*, for publication in a House of Parliament[4], or by its order; and also for publication in a Court of Justice[5].

(*b*) *Qualified; i.e.*, arising *primâ facie*, but ceasing if the prosecution shew that the publication was made with a spiteful motive, or, in other words, that there was "express" malice on the part of the defendant. A privilege of this qualified character is conceded to matter that is published under a legal or even a social duty; or as a fair comment upon a subject of public concern[6]; or for the protection of any of the interests of the person publishing it, (or, probably

[1] Pollock on Torts, ch. VII. s. 2.
[2] *Emmens* v. *Pottle*, L. R. 16 Q. B. D. 354.
[3] *Capital and Counties Bank* v. *Henty*, L. R. 7 A. C. at p. 776.
[4] *Rex* v. *Lord Abingdon*, 1 Esp. 225 (K. S. C. 440).
[5] *Watson* v. *Jones*, L. R. [1905] A. C. 480.
[6] *Thomas* v. *Bradbury*, L. R. [1906] 2 K. B. 627.

even of the interests of the person to whom it is published[1]); and to fair and accurate reports of Parliamentary or judicial proceedings[2]; and also, by statute[3], to such fair and accurate reports of public meetings, or of open sittings of public bodies, as are published in a "newspaper" and relate to some matter of public concern.

(VI) It is the function of the judge to decide (i) whether the document is reasonably capable of bearing the alleged defamatory meaning; (ii) whether the occasion was privileged; and—where there exists a qualified privilege—(iii) whether there is *any* evidence of express malice. All other matters —including now even the fundamental question whether the document is or is not a libel[4]—are left to the jury.

But though the criminal and the civil rules as to cases of libel are, fundamentally, thus similar, they differ as regards some four minor points. These are the following:—

(1) No civil action will lie for a libel unless it has been published to some *third* person; since the sole object of such an action is to secure to the plaintiff compensation for the wrongful loss of that esteem in which other people formerly held him[5]. Hence a defamatory letter addressed to the very person defamed will not, in the ordinary course, be actionable; though a defamatory post-card addressed to him will be. But the reason for the criminal prohibition against libels is, on the other hand, their tendency to provoke the libelled person into committing a breach of the peace; and

[1] *Coxhead* v. *Richards*, 2 C. B. 569.

[2] *Usill* v. *Hales*, L. R. 3 C. P. D. 319 (K. S. C. 442).

[3] 51 and 52 Vict. c. 64, s. 4.

[4] See Lord Campbell's *Lives of the Lord Chancellors*, ch. CLXXVIII., and May's *Constitutional History*, II. 108—117, as to the historic controversy, during 1752—1791, on this important constitutional question, ultimately settled by Mr Fox's Libel Act, 32 Geo. III. c. 60.

[5] *Barrow* v. *Llewellin*, Hobart 62 (K. S. C. 437).

this tendency is naturally greatest when it is directly to himself that the defamation is addressed. Accordingly a publication to the actual person defamed is quite sufficient to support an indictment[1].

(2) The *truth* of the matter complained of has long been a good defence in a civil action for libel; for it shews that the plaintiff has no right to that reputation which he claims compensation for being deprived of. But the common law did not regard this as being any defence to criminal[2] proceedings; for the truer the charge, the more likely was it to cause a breach of the peace. An honest man may often despise calumnies; but a rascal is sure to resent exposure. Hence in criminal courts it used even to be a maxim that "the greater the truth, the greater the libel." But this difference between the civil and criminal rules has been almost wholly removed by Lord Campbell's Act, (6 and 7 Vict. c. 96), which permits the truth of a private libel to be a valid defence to criminal proceedings for it. This permission is, however, subject to a proviso that the defendant must further allege expressly, and prove, that it was for the public benefit that the matter in question should be made known. The existence of this proviso makes it possible to repress the publication of statements which, though quite true, are objectionable, whether on grounds of decency, or as being disclosures of State secrets, or as being painful yet needless intrusions into the privacy of domestic life. It may be for the public benefit to make it known that a man is suffering from an infectious fever; but not that he is suffering from heart-disease, or from some carefully concealed

[1] *Clutterbuck* v. *Chaffers*, 1 Starkie 471 (K. S. C. 438). Cf. 4 Bl. Comm. 150. It is often said that when the publication is, thus, only to the person libelled the indictment must expressly allege an intent to cause a breach of the peace. But it would seem that this is not really necessary; for in *Reg.* v. *Adams* (L. R. 22 Q. B. D. 66) the count contained no such allegation.

[2] Hobart 253; Moore 627; 5 Coke Rep. 125. Cf. the similar rule in the recent Italian Penal Code, Art. 394.

deformity, (like that club-foot, the consciousness of whose existence embittered the whole life of Byron).

(3) There is no civil action for libelling a *class* of persons, if, as must usually be the case, its members are too numerous to join as plaintiffs in a litigation. But since, technically speaking, it is not by the persons injured, but by the King, that criminal proceedings are carried on, an indictment will lie; provided only that the class defamed be not an indefinite (*e.g.*, "the men of science," "the Socialists") but a definite one, (*e.g.*, "the clergy of the diocese of Durham[1]," "the justices of the peace for the county of Middlesex[2]").

(4) No civil action for a libel upon a person *deceased* has ever been brought by his representatives[3]; for the dead have no legal rights and can suffer no legal wrongs[4]. But in those extreme cases where the libel, under the guise of attacking the dead man, attacks living ones by bringing his posterity into contempt or hatred, they—like any other class of persons who are injured by a libel—may obtain protection from the criminal law[5]. Yet to extend that protection to the case of ordinary attacks upon the reputation of persons deceased, would be to impose an intolerable restraint upon the literary freedom of every writer of modern history[6]; especially as the lapse of time might have rendered it impossible for him to obtain *legal* proof of the truth of his statements, and as that truth, moreover, even if proved, might not be of sufficient public moment to constitute

[1] *Rex* v. *Williams*, 5 B. and Ald. 595. Cf. *The Case of the Jews*, 2 Swanston 503.

[2] *Rex* v. *Holloway*, cited 5 B. and Ald. 595.

[3] *Reg.* v. *Labouchere*, L. R. 12 Q. B. D. at p. 324.

[4] *Per* Stephen, J., in *Reg.* v. *Ensor*, 3 Times L. R. 366.

[5] See *Rex* v. *Topham*, 4 T. R. 130, recognised in *Reg.* v. *Ensor*; and *Rex* v. *Hunt*, 2 St. Tr. (N. S.) 69, for libelling Geo. III. in Geo. IV.'s reign.

[6] See however the careful provision in the Italian Penal Code (Art. 399) to make possible such prosecutions.

a statutory defence to criminal proceedings. Historical criticism may, no doubt, cause much pain to the descendants of the person criticised; but mere mental suffering never suffices, by itself, to render wrongful, either criminally or civilly, the acts which cause it, it not being a usual and uniform result but "largely due to individual peculiarities[1]."

Besides differing thus in their treatment of libellous writings the two systems also differ in their treatment of the cognate subject of unlawful *oral* utterances. These never create, as a defamatory libel does, a twofold liability, at once civil and criminal. For if the spoken words are merely Slander, *i.e.*, if they only defame private persons, a civil action will lie in certain grave cases[2], but an indictment will not lie[3] (except in those rare instances where the words tend quite directly to a breach of the peace, as when they convey a challenge to fight[4]). And, conversely, if the oral words are blasphemous[5], or obscene[6], or seditious[7], or reflect on the administration of justice[8], an indictment can be brought (as for similar *written* words), but no civil action can.

Libel is a misdemeanor, punishable with fine and imprisonment. In the case of seditious, blasphemous, and other public libels there appears to be no limit to the period

[1] Bigelow on Torts, s. 293. [2] See Pollock on Torts, ch. VII. s. 1.

[3] But the Indian Penal Code (s. 499) allows criminal proceedings for slander.

[4] *Reg.* v. *Langley*, 6 Mod. 125 (K. S. C. 437).

[5] As to the present uncertainty as to what constitutes an indictable blasphemy, see Stephen, *Dig. Cr. Law*, Art. 179, and Lord Coleridge's summing up in *Reg.* v. *Ramsay*, 1 Cababé and Ellis 126. For a remarkable conviction of a Catholic priest for contemptuously burning a Protestant Bible, see *Reg.* v. *Petcherini*, 7 Cox 79.

[6] *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360.

[7] 1 Hawkins P. C. 66, 486.

[8] *Rex* v. *White*, 1 Campbell 359.

of imprisonment; and similar words uttered orally are punishable similarly. But in the case of defamatory libels, the term has been restricted by statute to two years, when the libel was published with a knowledge of its being false[1]; and, in all other cases of defamatory libels, to a single year[2]. Hard labour cannot be imposed in any case of libel, whether defamatory or public[3].

[1] 6 and 7 Vict. c. 96, s. 4.

[2] *Ibid.* s. 5.

[3] And in the case of *seditious* libels or utterances, the form of imprisonment must be only that of offenders of the *first* division (40 and 41 Vict. c. 21, s. 40).

CHAPTER XXII.

OFFENCES AGAINST INTERNATIONAL LAW.

WITH a view of discharging those duties to the other nations of civilised mankind which are imposed upon us alike by political prudence and by International Law, our criminal law has made provision for the punishment of all persons who (1) violate the rights of the ambassadors sent to us by foreign nations, or (2) commit acts of piracy, or (3) violate the neutrality due from us to belligerent nations.

(1) As regards offences against the privileges of ambassadors, it is unnecessary to add to the brief mention that has already been made of the statute of 1708[1], which makes it a misdemeanor (with remarkable peculiarities of procedure) to execute even a judicial civil process against the person or goods of any ambassador or his registered servant.

(2) Of piracy according to International Law, (or "piracy *jure gentium*") we obtain a good example when the crew of a vessel mutiny, and seize the ship. But, old and famous though the crime is, there is not, even now, any authoritative definition of it[2]. Clearly it is not every felony that becomes piracy by being committed on board ship; for violence is essential, so mere larcenous pilfering would not suffice. The Judicial Committee of the Privy Council has endorsed[3] the

[1] 7 Anne, c. 12; *supra*, p. 94.

[2] Stephen, *Hist. Cr. Law*, II. 27; *Dig. Cr. Law*, Arts. 108—122.

[3] In *Att. Gen. of Hong Kong* v. *Kwok-a-Sing*, L. R. 5 P. C. 199.

rule, laid down by Sir Charles Hedges so long ago as 1696[1], that piracy is "only a sea term for robbery." But this is not absolutely precise; for an unsuccessful though violent attempt at pillage would be treated as a piracy if committed at sea; although on land it would not be a robbery, but only an assault with intent to rob[2]. Moreover some menacing thefts which by English law do technically amount to robberies would not be regarded as piracy if they were committed at sea. Probably the best approach to a correct definition is "any armed violence at sea which is not a lawful act of War." For a pirate must be one who may be taken to be a source of danger to the vessels of all nations; and therefore those who act solely against a particular belligerent, and in the interests of the Power that is at war with it, are not pirates, even though they go beyond their commission. Nor will they be, even though their action be spontaneous and without any commission at all from the Power (whether a recognised State or not) whose interests they serve[3]. But, whatever be the precise limits of piracy *jure gentium*, it is at least clear that nothing that does not fall within them would be taken account of, as a piracy, by the common law.

But by statute it has further been made piracy:—

(*a*) For any British subject to commit hostilities at sea, under the commission of any foreign Power, against *other British subjects*[4];

(*b*) For any British subject, or any resident in the British dominions, to take part in the slave trade[5].

Every piracy, whether of the common-law form or of the statutory, is a felony, and usually punishable with penal servitude for life[6]. But if accompanied by any act that

[1] *Rex* v. *Dawson*, 13 St. Tr. 454. Cf. Hall's *International Law*, 3rd ed., pp. 252—264.

[2] Stephen, *Hist. Cr. Law*, II. 28.

[3] *In re Tivnan*, 5 B. and S. at p. 680.

[4] 11 and 12 Wm. III. c. 7, s. 7.

[5] 5 Geo. IV. c. 113, s. 9.

[6] 1 Vict. c. 88, s. 1, and the Penal Servitude Acts.

may endanger life it is punishable with death[1]. It is an offence now almost unknown in our courts; no case having occurred since 1894, and that only an unimportant one[2].

(3) Previously to the nineteenth century, there was no hindrance in the way of an Englishman's following the profession of a soldier of fortune wheresoever he chose; saving only the claim of the King of England to his continued loyalty, and perhaps to his services if they should be needed[3]. The former right of the King was considered to be in jeopardy in James I.'s reign, and an Act (3 Jac. I. c. 4) was passed with the object of preventing subjects of the Crown from being contaminated in religion or loyalty by the Jesuits whom they might meet in Continental armies[4]. The second right appears to have been in the mind of the framers of the statute passed in 1736[5], now repealed, which made it felony, without benefit of clergy, to enlist in the service of any foreign prince; an enactment which seems, however, to have remained a dead letter. But the modern development of International Law created a new reason for similar prohibitions; and in the nineteenth century Foreign Enlistment Acts were passed with the object of preserving England's neutrality, by forbidding her subjects to give any assistance to foreign belligerents. In treatises on International Law[6] the student will find narrated the growth of the principle of Neutrality, as determining the course of conduct to which nations are now bound to adhere, whenever a condition of war exists between Powers with whom they themselves are at peace. The ancient powers of the Crown in England being insufficient to enable it to prevent its subjects from

[1] 1 Vict. c. 88, s. 2.

[2] *Criminal Statistics of England and Wales*, issue of 1901, p. 29.

[3] See Stephen, *Hist. Cr. Law*, III. 257—262; *Dig. Cr. Law*, Arts. 104—107.

[4] See the preamble to the Act.

[5] 9 Geo. II. c. 30.

[6] See Dr T. J. Lawrence's *Principles of International Law*, pp. 542—556; Hall's *International Law*, 3rd ed. pp. 591—633.

committing acts which might be at variance with the modern conceptions of the obligations of neutrality, Parliament found it necessary to make participation in foreign hostilities a criminal offence. The first Foreign Enlistment Act was passed in 1819[1], to restrain outbursts of sympathy with the revolt of Spain's South American colonies against her. During the American Civil War, it proved insufficient to prevent the traffic between English shipbuilders and the Confederate Government; and was accordingly replaced in 1870 by a more stringent enactment[2]. Under this one, the chief offences forbidden are:—

1. To enlist oneself or others—without a licence from the Crown—for service under a foreign State which is at war with a State that is at peace with us[3].

2. To equip, build[4], despatch, or even agree to build, within British dominions—without licence from the Crown—a ship with reasonable cause to believe that it will be employed in the service of a foreign belligerent[5].

3. To fit out, within the British dominions—without a licence from the Crown—any naval or military expedition to proceed against the dominions of any State that is at peace with us[6].

Each of these offences is a misdemeanor, punishable with a fine and with imprisonment for a period not exceeding two years, with or without hard labour. All ships or munitions of war in respect of which the offence is committed are to be forfeited to the Crown.

The student must bear in mind that, though it is sometimes said that "International Law is part of the laws of

[1] 59 Geo. III. c. 69. [2] 33 and 34 Vict. c. 90.

[3] s. 4. This is an offence whether committed within *or even without* the British dominions.

[4] The previous Act (of 1819) forbade nothing short of the ultimate "equipping, fitting-out, or arming" of a ship. See the case of the *Alexandra*, 2 H. and C. 431. [5] *Ibid.* s. 8.

[6] *Ibid.* s. 11; see *Reg.* v. *Jameson*, L. R. [1896] 2 Q. B. 425.

England," this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not lie for not loving your neighbour as yourself. Equally little will it lie for trading in contraband of war, or for the running of a blockade. Both these acts are visited by International Law with the penalties of confiscation; but neither of them constitutes any offence against the laws of England, or is even sufficiently unlawful to render void a contract connected with it[1].

[1] See *Ex parte Chavasse*, 4 De G. J. and S. 655.

CHAPTER XXIII.

OFFENCES OF VAGRANCY.

THE historical interest and the juridical anomalies of the Vagrant Act are such as to justify a fuller reference to it here than the importance of the offences created by it might seem to call for. An experienced observer of criminal proceedings has pronounced it, somewhat sweepingly, to be "the most unconstitutional law yet lingering on the statute book[1]." It is a survival from a long series of penal enactments—enforced by imprisonment, flogging, enslavement, and death—whereby the legislature strove to grapple with the difficulties created by the steady increase in the numbers of the migratory population. Legislation for this purpose began so far back as 1388, when the dearth of labourers, caused by the devastations of the Black Death in the period 1348—1369, had produced competition amongst employers and, consequently, many migrations of labourers towards the districts where they might best hope to avail themselves of this competition. The legislature interposed in order to check both the rise of wages consequent upon all such free exchange between labour and capital, and also some more genuine evils, arising from the mendicancy of such of the wanderers as did not obtain employment, and the dishonesty of many of them who did not even seek for it. To this latter class of vagrants, a dangerous addition was made in the reign of Henry VIII. by the arrival of the first Gipsies.

[1] Serjeant Cox's *Principles of Punishment*, p. 212.

The establishment under Elizabeth of a compulsory parochial assessment, for the relief of the destitute, naturally led to the imposition of further penalties to protect parishes from the arrival of strangers who might become a burden on the local assessment. The modern reform of our industrial legislation and of our system of poor-relief has now swept away almost the whole of the long series of enactments which four centuries had accumulated. But there still remains the Vagrant Act of 1824; whose provisions might be unintelligible if we did not regard them as a supplement to the old Poor Law, intended to prevent indigent persons from wandering out of their parishes, and to restrain the offences likely to be committed by such wanderers. Offenders against the Act (5 Geo. 4. c. 83) are of three classes; according to the maximum punishment which can be inflicted upon them. Every case is tried at Petty Sessions; though in cases of the third class, as will be seen, the sentence is not pronounced there.

I. The first class consists of the persons who are guilty of the more trivial offences of vagrancy. Typical instances are:—

(1) A person whose wilful neglect to work causes him or her, or any of his or her family, to become chargeable to the parish.

(2) A person wandering abroad to hawk goods without a pedlar's licence.

(3) A person begging in any public place, or encouraging any child to do so.

All these are technically denominated by the Act "*Idle and disorderly persons.*" They are liable to a punishment of imprisonment for not more than a month with or without hard labour, or a fine not exceeding £5.

II. The second class consists of the persons who are guilty of the more grave forms of vagrancy. The following instances may be cited:—

1. A person convicted for a second time of any of the offences of the former series.

2. A person running away and leaving his wife or child chargeable to the parish.

3. A person endeavouring to procure alms by exposing deformities or by making fraudulent pretences.

4. A person found in a building, or inside an enclosed yard or garden, for any unlawful (*i.e.*, criminal[1]) purpose.

5. A person gaming[2], in an open and public place, at some game of chance, with cards, coins, or other instruments[3].

6. A person telling fortunes; or using any subtle craft, by palmistry or otherwise, to deceive[4], *e.g.*, casting astrological nativities.

7. A person wandering abroad, without visible means of subsistence, and lodging in unoccupied buildings or under a tent or in a cart, and not giving a good account of himself. Between eight and nine thousand persons annually are convicted of thus "sleeping out," as this offence is commonly designated.

[1] Not mere immorality; *Haynes* v. *Stephenson*, 25 J. P. 329.

[2] See above, p. 47 *n.*

[3] This does not cover the depositing of money on a bet made with a person standing in a street to receive bets upon a horse race; *Redway* v. *Farndale*, L. R. [1892] 2 Q. B. 309. And a coin does not become an "instrument" by being used for tossing up; *Watson* v. *Martin*, 34 L. J. B., M. C. 50. The clause of 1824 is strengthened by 36 and 37 Vict. c. 38 s. 3.

[4] Deception by mere avowed legerdemain is not included; *Johnson* v. *Fenner*, 33 J. P. 740.

8. A male person (*a*) knowingly living, wholly or in part, on the earnings of prostitution, or (β) persistently soliciting, in public, for immoral purposes. This much-needed prohibition of the calling of a *souteneur* was added by the Vagrancy Act, 1898 (61 and 62 Vict. c. 39). In 1905, 261 men were punished under it.

All these are styled "*Rogues and Vagabonds.*" (Both words originally meant simply "wanderers," the "rogues forlorn" of King Lear; from the Latin *rotare* and *vagari*[1].) They may be punished with imprisonment up to three months, with or without hard labour, or with a fine not exceeding £25.

III. The third class consists chiefly of those who have been twice convicted—or who have resisted arrest when apprehended on even a first charge—of an offence of the second series. Such a person is technically an "*Incorrigible Rogue.*" The procedure is curious. The offender, as in the two previous classes, is convicted at a court of Petty Sessions; but this court can only commit him to imprisonment (with hard labour) until the next court of Quarter Sessions. That court will receive the conviction, and without further accusation or evidence will pass the sentence upon it; which may extend to a year's further imprisonment, with hard labour; and in the case of a male, the prisoner may also be ordered to be whipped.

Of recent years there has been a large increase in prosecutions under the Vagrant Act; thus in 1900 the convictions for begging, and for sleeping out, were less than half of what they had risen to in 1905. (In 1899—1901, prison diet was made more liberal.)

[1] "But the idea of leading a wandering life is now not at all an ingredient" in the legal definition; L. R. 2 Ex. Div. p. 277.

BOOK III.

MODES OF JUDICIAL PROOF.

CHAPTER XXIV.

THE NATURE OF PRESUMPTIONS AND OF EVIDENCE.

A READY knowledge of the law of evidence is essential to all who are engaged in forensic practice. The occasions for applying it arise suddenly; and the rules must be put in force forthwith, before the witness has had time to break them. Hence, as Sir Henry Maine has remarked, there is probably no other legal accomplishment so widely diffused amongst the members of the English bar as skill in appreciating evidence and familiarity with the law relating to it.

The constitutional value of the rules of evidence is very great. For they have done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law, and has thereby facilitated the task of government to an extent surprising to continental observers. In the emphatic words of the late Professor W. L. Birkbeck, Q.C., "the Jury and the law of Evidence are Englishmen's two great safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice." And these two safeguards are intimately connected; for the one is a product of the other. Our rules of evidence were created in consequence of a peculiarity of English procedure, in taking away from the trained judges the determination of questions of fact, and entrusting it to untrained laymen. The Romans had no law of evidence; for, with them, questions of fact were always tried by a *judex* who was a citizen

of rank and intelligence, (*e.g.*, under the Republic, a senator or a knight). But in England such questions were left to plain jurymen; whose inexpertness led the courts to establish many rules for the exclusion of certain kinds of evidence that seemed likely to mislead untrained minds.

Whenever, in any country, a tribunal is called upon to decide any question of fact, it must do so either by obtaining actual evidence, or by the easier but less precise method of employing, instead, some *à priori* presumption. Before commencing a detailed account of evidence, it may be convenient to explain the technical substitute which thus sometimes replaces it. Presumptions are usually said to be of three kinds.

(i) *Praesumptiones juris et de jure.* These are inferences of fact so overwhelming that the law will not permit evidence to be called to contradict them. We have already noticed one of them; viz., the presumption that an infant under seven cannot have a guilty intention[1]. Such rules, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules.

(ii) *Praesumptiones juris, i.e.*, inferences of fact which only hold good until evidence has been given which contradicts them. They thus afford merely a *primâ facie* proof of the fact presumed; a proof which may be overthrown by evidence which negatives it, or by collision with some other and still stronger presumption which suggests a contrary inference. Thus, in the United States, when slavery existed, there was, in the slaveholding States, a *primâ facie* presumption that every man of black or mulatto skin was a slave, unless he proved himself to be a freeman[2].

(iii) *Praesumptiones hominis,* or *facti.* These do not really deserve to be classed amongst legal presumptions; for

[1] *Supra*, p. 49.
[2] Wheeler's *Laws of Slavery*, p. 392.

though, like the two preceding classes, they are inferences of fact, the law does not (as in those two cases) command juries to draw them, but only advises their doing so. A good instance of such a recommendation is the presumption that an accomplice usually needs corroboration.

The presumptions important enough to call for detailed notice here belong mainly to the second class, the *praesumptiones juris, sed non de jure.*

(1) There is a presumption of this kind against the commission of any crime. This holds good, not merely in criminal trials, but equally in every civil case where any allegation is made that a criminal act has been committed[1]. So strong is this presumption that in order to rebut it, the crime must be brought home to the prisoner "beyond reasonable doubt[2]; and the graver the crime, the greater will be the degree of doubt that is reasonable. Hence (*a*) the commission of the crime—that the horse actually was stolen, or the man killed—must be clearly proved; so clearly, that circumstantial evidence will rarely suffice to prove it[3]. Thus on a charge of murder the fact of death must be very clearly proved; which can rarely be done unless the body be produced, mere circumstantial evidence of death thus being usually insufficient[4]. Moreover (*b*) after proving that the crime was committed, the prosecution must also prove distinctly that the person accused committed it; so that when two men are charged with a crime, and it is made clear that one of them committed it, but it cannot be shewn which one, both must be acquitted[5].

Strong as is the presumption of Innocence, it is not too strong to be rebutted by the presumption of the Continuance of Life[6]; *e.g.*, in a case of bigamy, the presumption that the

[1] *Williams* v. *East India Co.*, 3 East 192 (K. S. C. 472).
[2] *Reg.* v. *Manning*, K. S. C. 446. [3] *Infra*, p. 338.
[4] Hale P. C. ch. xxxix. (K. S. C. 449); 3 Coke Inst. 104 (K. S. C. 449).
[5] *Rex* v. *Richardson*, Leach 887 (K. S. C. 448). [6] *Infra*, p. 329.

prisoner would not have contracted a second marriage unless his first wife were dead, may be outweighed if it be shewn that she was alive only five and twenty days before this second wedding took place[1]. But it may be useful to note that an amount of testimony which is not sufficient to rebut the presumption of innocence entirely[2], (*i.e.*, to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation[3]. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted. A frequent illustration of this occurs in the case where a person accused of theft is shewn to have been in possession of the stolen goods shortly after they were stolen[4].

(2) There is a presumption against the commission of any immoral act. Hence cohabitation is, in most cases, sufficient *primâ facie* evidence of marriage[5]. And birth is presumed to be legitimate[6]. But the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing. Hence *A*'s cohabitation with *B* does not constitute such strong evidence of his being married to her as will justify his being convicted of bigamy if he proceeds to marry *C*[7].

(3) *Omnia praesumuntur ritè ac solenniter esse acta*; *i.e.*, all things are presumed to have been done in the due and

[1] 2 A. and E. 540; *secus*, if no more shewn than that she was alive twelve months before the second wedding, 2 B. and Ald. 389.

[2] For illustrations of such insufficient evidence see *Reg.* v. *Walker*, Dearsly 280 (K. S. C. 450); *Reg.* v. *Slingsby*, 4 F. and F. 61 (K. S. C. 452). Contrast *Reg.* v. *Hobson*, Dearsly 400 (K. S. C. 453).

[3] *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374).

[4] *Infra*, p. 329.

[5] *Doe dem. Fleming* v. *Fleming*, 4 Bingham 266 (K. S. C. 458).

[6] *Morris* v. *Davies*, 5 Cl. and F. 163.

[7] *Morris* v. *Miller*, 1 W. Bl. 632 (K. S. C. 459).

wonted manner. This presumption is one of great force, especially when applied to public or official acts. Thus from the fact that a church has been frequently used for the celebration of marriage services the court will infer that it had been duly licensed for that purpose[1]. Similarly the fact of a person's acting in a public office, (*e.g.*, as sheriff[2], justice of the peace, or constable[3]), is sufficient *primâ facie* evidence of his having been duly appointed to it[4]. And there is a presumption that in any Government office the regular course of business has been followed; (*e.g.*, that the particulars on a postmark represent the time and place at which the letter was handled in the post). Even in a private establishment the course of dealing may become so systematic and regular as to justify a similar employment of this presumption. Thus a letter left in the ordinary course with a servant for delivery to his master may be presumed to have reached the master's hands[5]. Again, a deed will be presumed to have been executed on the day whose date it bears[6]. And the holder of a bill of exchange is deemed *primâ facie* to be a "holder in due course."

(4) The possessor of property, real or personal, is presumed *primâ facie* to be full owner of it[7]. In the case of real property, accordingly, the presumption is that he is seised in fee simple[8].

(5) There is a presumption that any existing state of things will continue for some time further. Accordingly if a partnership or agency is shewn to have once existed, those who allege it to have been subsequently dissolved will have

[1] *Reg.* v. *Cresswell*, L. R. 1 Q. B. D. 446.
[2] *Bunbury* v. *Matthews*, 1 C. and K. 382.
[3] *Berryman* v. *Wise*, 4 T. R. 366.
[4] *Rex* v. *Borrett*, 6 C. and P. 124 (K. S. C. 461).
[5] *Macgregor* v. *Kelly*, 3 Exch. 794.
[6] *Malpas* v. *Clements*, 19 L. J. R., Q. B. 435.
[7] *Webb* v. *Fox*, 7 T. R. 397.
[8] *Doe* v. *Coulthred*, 7 A. and E. 239.

the burden of proving the dissolution[1]. This presumption is often applied in questions as to the duration of human life. Where a person is once shewn to have been living he will be presumed to have continued alive[2] for some time longer; though the strength of this presumption will depend upon the particular circumstances of the case, such as his age and his state of health[3]. But if it be shewn that for the last seven years he has not been heard of by those persons who would naturally have heard of him had he been alive, the presumption of his continued existence becomes reversed[4].

(6) There is a presumption that a custom which has been observed for twenty years has been observed immemorially; as, for instance, a peculiar mode of nominating the jury of a manorial court[5].

Besides these obligatory presumptions of Law, there is one of the discretionary presumptions of Fact[6] which is so frequently employed as to deserve careful attention. This is the rule that the possessor of goods recently stolen may fairly be regarded as either the actual thief or else a guilty receiver[7]. And it has been laid down that a man's possession of such goods raises a presumption of his having a guilty connexion not merely thus with the theft, but also with any further crime that accompanied the theft, *e.g.*, a burglary, an arson, or a murder; though, so far as regards this, the presumption is less cogent[8].

We have said that this presumption arises in the case of goods which have been stolen recently. It therefore does not arise until proof has been given that the goods in question

[1] *Clark* v. *Alexander*, 8 Scott N. R. 161.

[2] *Reg.* v. *Jones*, L. R. 11 Q. B. D. 118 (K. S. C. 428); *Reg.* v. *Willshire*, L. R. 6 Q. B. D. 366 (K. S. C. 429).

[3] *Rex* v. *Harborne*, 2 A. and E. 540.

[4] *Hopewell* v. *De Pinna*, 2 Camp. 113.

[5] *Rex* v. *Joliffe*, 2 B. and C. 54.

[6] Best on Evidence, p. 434 *n*.

[7] *Reg.* v. *Langmead*, L. and C. 427 (K. S. C. 464).

[8] *Per* Pollock, C.B., in *Reg.* v. *Exall*, 4 F. and F. 922.

have actually been stolen[1]. Thus it is not sufficient that a tramp is wearing three gold watches and does not give a satisfactory account as to how he got possession of them[2]. As to what time is near enough to be "recent," no general rule can be given; for the period within which the presumption can operate will vary according to the nature of the article stolen. For such articles as pass from hand to hand readily, two months would be a long time; particularly in the case of money. In regard to a horse, it has been held that six months is too long[3]. And it would seem that, whatever the article were, sixteen months would be too long a period[4]. We have already seen[5] that this presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue[6]. But if he has put forward two inconsistent accounts, his explanation cannot be regarded as satisfactory; and the prosecution need not call evidence to rebut these varying stories[7].

EVIDENCE.

A litigant, whose case is not made out for him by any Presumption, must convince the tribunal by producing Evidence. The evidence known to our courts admits of a ready classification, according to differences in its intrinsic nature, into three kinds; which are respectively described in the Indian Evidence Act as (*a*) Oral evidence, (*b*) Documen-

[1] 2 Hale P. C. ch. xxxix.; *Rex* v. *Yend*, 6 C. and P. 176 (K. S. C. 468).
[2] Contrast, in *London*, no. (iii) on p. 346, below.
[3] *Reg.* v. *Cooper*, 3 C. and K. 318 (K. S. C. 470).
[4] 2 C. and P. 459, (K. S. C. 469), *per* Bayley, J.
[5] *Supra*, p. 327.
[6] *Reg.* v. *Crowhurst*, 1 C. and K. 370 (K. S. C. 470).
[7] *Reg.* v. *Dibley*, 2 C. and K. 818.

tary evidence, (*c*) Material—meaning thereby not "relevant" but "physical"—non-documentary evidence. The same principle of classification has been carried out, in other phraseology and in a slightly different arrangement, by Jeremy Bentham, as follows:—

1. "Real" evidence, *i.e.*, that consisting in the condition of a thing; as, for example, a fence, a uniform, a tattoo mark, a wound, a smell of prussic acid. Thus blood stains upon a knife are "real" evidence of its having caused a wound.

2. "Personal" evidence, *i.e.*, evidence which was produced directly by the mental condition of a human being. It may be either,

(*a*) Involuntary, *e.g.*, a blush.

(*b*) Voluntary, (or, Testimonial); *e.g.*, an affidavit. This may be either,

(i) Oral, or

(ii) Written.

There is also a very dissimilar, but not less important, mode of classifying evidence, which turns upon differences in its logical bearing upon the question to be decided. Considered from this point of view, all evidence is either (i) direct, or (ii) indirect (or, "circumstantial[1]").

(i) Direct evidence is testimonial evidence to one or more of the *facta probanda*, (or "facts in issue"); *i.e.*, those facts which, if all of them be proved, render legally necessary a decision favourable to the person producing them.

(ii) All other evidence is "circumstantial." This term consequently includes:—

(*a*) all "real" evidence;

(*b*) all "involuntary personal" evidence;

[1] The student must distinguish between this technical use of the word, and a more popular one, in which it is also applied to evidence, but means simply "full of detail," "circumstanti*ated*," (*e.g.*, "his tedious and circumstantial description"); and in which it consequently may be as applicable to a witness's Direct as to his Indirect evidence.

(*c*) such testimonial evidence as concerns only *facta probantia*; *i.e.*, circumstances which tend to prove, or to disprove, some *factum probandum*, or "fact in issue"—some fact, that is, which is an essential part of the question to be tried. Thus in a prosecution for libel, the act of publication by the defendant is a fact in issue; whilst the similarity of the defendant's ordinary handwriting to that on the envelope in which the libellous document was posted, is a fact that tends to prove this fact, and so becomes relevant to the issue.

The following are instances of some of the principal forms of circumstantial evidence most familiar in criminal cases:—the rank of the defendant, his disposition, his motives, his threats, his preparations, his attempts, his false statements, his silence, his fabrication or destruction of evidence, his flight, his possession of stolen property. But circumstantial evidence is just as applicable in civil cases as in criminal. (Thus, in an action on a loan, the defendant may call evidence of the poverty of the plaintiff in order to help to prove that the money was not lent[1].) Yet the controversies with regard to its value have arisen almost entirely in connexion with criminal offences. For the much greater severity of the penalties that may be inflicted for them has caused many persons to challenge the probative force of circumstantial evidence, as being logically inadequate to support a conviction for (at any rate) any capital crime.

The question thus raised is so fundamental as to need our careful consideration. It is clear that in dealing with any testimonial evidence whatever, whether "circumstantial" or "direct," a jury may be misled. For they have to depend upon:—

(1) the accuracy of the witness's original observation of the events he describes;

(2) the correctness of his memory;

(3) his veracity.

[1] *Dowling* v. *Dowling*, 10 Ir. C. L. 236.

But in addition to the risks of mistake, forgetfulness, and falsehood, which thus arise even when none but direct evidence is given, there are additional risks to run in dealing with circumstantial evidence. For here the jury have also to depend upon:—

(4) the cohesion of each circumstance in the evidence with the rest of that chain of circumstances of which it forms a part;

(5) the logical accuracy of the jury themselves in deducing inferences from this chain of facts.

These last two hazards have impressed some writers so deeply as to make them urge that no conviction for any capital offence should be allowed to take place upon merely circumstantial evidence. But those who so contend have not always realised that in every criminal case the *mens rea* must necessarily be proved by circumstantial evidence alone[1]; (except when the prisoner actually confesses). Nor have they realised how extremely obvious may often be the inference to be drawn from circumstantial evidence; as, for instance, in a case of evidence of an "alibi[2]." Indeed the circumstantial element often plays a large part in what would pass, at first sight, as excellent "direct" evidence. Thus a witness may depose that he saw *A* point a rifle at *B* and fire it; saw the smoke, heard the crack, and saw *B* fall; and then, on going up to him, saw a bullet-hole in his leg. But still he did not see *A*'s bullet strike *B*; so this fact (the really essential one) depends entirely upon circumstantial

[1] The task of inferring the *mens rea* from such evidence is often facilitated by certain presumptions of law, *e.g.*, that "a man intends the natural and probable consequences of his act"; or that an intentional killing is to be *primâ facie* supposed to have been due to murderous malice, *supra*, p. 139.

[2] Or of identity. Thus, in identification by Fingerprints, error is almost impossible; *e.g.*, of the million fingerprints now recorded by the London police, no two correspond in more than seven out of the eleven "characteristics" by which they are classified.

evidence; *i.e.*, it has to be merely inferred from these other facts which he actually did see[1].

No distrust of circumstantial evidence has been shewn by English law. It does not even require that direct evidence shall receive any preference over circumstantial. Memorable instances of important capital convictions, whose correctness is unquestioned, that were based solely on indirect evidence are found in the trials of Courvoisier for the murder of Lord William Russell in 1840[2], and of Patch for the murder of Mr Bligh in 1805[3]. In this last case the circumstantial evidence of guilt had such force as to outweigh the direct evidence as to time; which, (if believed), would have shewn the prisoner to be innocent.

Indeed some experienced English and American lawyers have even gone so far as to prefer circumstantial evidence to direct. "Witnesses," say they, "can lie; circumstances cannot." Undoubtedly many famous cases may be cited where great masses of direct evidence have proved to be utterly misleading. Such cases have shewn that the direct and explicit assertions of scores of witnesses, by being given on *opposite* sides, may create a far greater uncertainty than that which attends the employment of circumstantial evidence.

Three such cases may be briefly referred to.

(1) In the *Leigh Peerage Case*[4], the claimant of a title based his claim on his alleged descent from one Christopher Leigh. The proof of such descent was the alleged inscription on a monument, which was said to have formerly stood inside

[1] Accordingly, in an old case under unpopular Game Laws, a friendly jury accepted the hypothesis of the poacher's counsel, that the gun fired by his client was not loaded with shot, and that the pheasant died of mere fright. And the Superior Court did not set aside this verdict, (though, it being a civil case, they had full jurisdiction to do so). (4 T. R. 468.)

[2] *The Times*, June 19, 1840; Townsend's *Modern State Trials*, I. 267, where an account will be found of the grave question raised by this case as to the duties of an advocate to a client whom he knows to be guilty.

[3] *Annual Register* for 1806. [4] 1832. See the Committee's Report.

Stoneleigh Church. Thirty witnesses appeared before a committee of the House of Lords, and swore orally to their recollection of the monument; and affidavits to the same effect were made by about thirty others. But these sixty witnesses were contradicted (*a*) by twenty-one other witnesses, who denied altogether that any such monument had existed; and also (*b*) by the fact that their own descriptions of its shape, its colour, and the inscription carved on it were utterly irreconcileable[1]. Accordingly the committee refused to believe these sixty persons.

(2) In *Elizabeth Canning's Case*[2], thirty-five witnesses swore that a gipsy (of peculiarly unmistakable features) who had been convicted of a robbery in Middlesex, was in Dorsetshire at the time of the robbery; but were contradicted by twenty-five other witnesses, who swore to having seen her then in Middlesex. Besides shewing by this contradiction how untrustworthy even the most direct testimonial evidence may be, the case further emphasises the same lesson by the instance of Canning's own narrative of abduction and robbery, which was discredited by its sheer improbability, without being contradicted at all.

(3) But the case of *Reg.* v. *Castro*[3], the longest and most remarkable trial in our legal history, affords the most vivid

[1] To take, for instance, only some seven out of the first thirty, they thus differed as to the colour of the monument:—"nearly black"; "a kind of dove colour"; "black with white letters"; "had been originally white"; "black"; "light marble with dark introduced into it"; "bluish grey." As to its shape:—"oblong"; "square at top, but narrowed to a point at bottom"; "square at bottom, but narrowed to a point at top"; "square at top and square at bottom." And as to the inscription on it:—"all Latin"; "a great deal of it English"; "all English except *anno domini*"; "all Latin."

[2] 19 St. Tr. 283. A full account of this extraordinary case will be found in an article in *Blackwood's Magazine* for 1860, p. 581, written by a well-known metropolitan magistrate, who considers it "perhaps the most inexplicable judicial puzzle on record"; and also in one contributed by the present writer to the *Law Quarterly Review* in 1897. See *Cornhill Magazine*, 1904. Cf. the case of Mr Adolf Beck, *infra*, p. 512.

[3] *Annual Register*, vols. for 1871, 1872, 1873, 1874.

of all illustrations of the untrustworthiness of direct evidence. A butcher, named Castro, or Orton, came forward in 1866 claiming to be Sir Roger Tichborne, a young baronet who was believed to have perished in 1854 in a shipwreck. On Orton's being ultimately tried for perjury, 212 witnesses were examined for the Crown, and 256 for the defence. These included four large groups of people who respectively gave the following items of direct evidence:—

(1) the claimant is not Roger Tichborne;

(2) he is Arthur Orton;

(3) he is not Arthur Orton;

(4) he is Tichborne.

These four vast groups, accordingly, served only to prove each other to be untrustworthy; and the case had therefore to be decided by circumstantial evidence, such as the claimant's degree of education, his ignorance of the affairs of the Tichborne family, and his conduct towards them and towards the Orton family

These cases shew vividly that testimony, even when a large number of witnesses corroborate each other, may be quite untrustworthy; and therefore that direct evidence is not necessarily to be believed. It may even be less trustworthy than circumstantial evidence, if the latter happens to consist of a great number of detached facts, which are severally proved by different witnesses. For, in such a case, each witness's contribution may well appear to him too trivial for it to be worth while to commit perjury about it[1]; (though, on the other hand, the same triviality which thus diminishes the chance of mendacity, increases somewhat the chances of mistake and of forgetfulness). But in all other cases circum-

[1] "Wherever there can be any doubt as to the veracity of the witnesses, Indirect evidence, coming from different sources and from remote quarters, has a greater force and effect than Direct evidence"; *per* Pollock, C.B., in *Reg.* v. *Muller* (*The Times*, Oct. 31, 1864).

stantial evidence must certainly be pronounced to be less trustworthy than direct evidence; since a dangerous source of error is introduced by the difficulty of reasoning from the fragmentary items of proof to the conclusion to be proved. For, though "circumstances cannot lie," they can mislead[1]. They may even have been brought about for the very purpose of misleading; as when Joseph's silver cup was placed in Benjamin's sack, or when Lady Macbeth "smeared the sleeping grooms with blood."

Unfortunately it is in the graver rather than the lesser crimes that circumstantial evidence has the most frequently to be relied upon; because in such crimes an offender is the more careful to avoid eye-witnesses. Just as adultery can scarcely ever be proved by direct evidence[2], so no deliberately planned murder is likely to be carried out when any third person is at hand. Hence comes it that if a child has died just about the time of birth, though the question whether it was born alive or dead can usually be settled easily in civil actions, (friends of the mother, who were present at the birth, being called), yet its determination on a criminal trial for infanticide is usually most difficult[3]. For it ordinarily has to depend wholly on circumstantial evidence, and this has to be drawn from post-mortem appearances of an ambiguous character. Hence has arisen a widespread impression that the evidence *requisite* to prove live birth is different in civil and in criminal cases; the only difference being, in reality, in the evidence usually *available* in those respective cases.

[1] As when Bodin tells us that "For the woman not to weep when accused is one of the strongest presumptive proofs of witchcraft that Grillard and other Inquisitors had observed, after having tried and executed very many witches"; *Demonomanie*, IV. ch. IV.

[2] Sir F. Jeune has said that if direct evidence of adultery be given, this very fact should inspire doubts as to the accusation's being true.

[3] "Almost impracticable," (Ogston's *Medical Jurisprudence*, p. 220); "absolutely impossible," (T. F. Smith's *Med. Jur.*, p. 224). *Supra*, p. 129.

These various considerations point to the conclusion that circumstantial evidence should be admitted, but admitted only with watchful caution. With this conclusion the practice of English courts accords. (The caution, however, as Stephen[1] points out, must not be excessive; as when some suggest that there should be no conviction unless guilt be "the only possible inference" from the circumstances. For even in the best-proved case there must always be some possible hypothesis which would reconcile the evidence with innocence[2].) The prudent hesitation of English law in regard to circumstantial evidence has found expression in some familiar restrictions upon its employment. Two of these are of special importance.

(*a*) No conviction for larceny is to be allowed unless the fact that a larceny has actually taken place be proved fully. It is not enough that a penniless tramp has been found to be wearing two diamond rings. To convict him of larceny, it must further be proved that these rings had somewhere been stolen; and this must be proved either by direct evidence or at least by exceptionally strong circumstantial evidence. Usually therefore it will be necessary to bring the owner himself, to prove his loss of some article and its identity with the article which is the subject-matter of the indictment[3]. But it is possible that even circumstantial evidence may be so peculiarly strong as to justify a conviction without any such direct proof; as where a person, on coming out of a barn, is found to have corn, (or one coming out of a cellar is found to have wine), concealed under his coat[4].

(*b*) Similarly no conviction for homicide is to be allowed unless the fact there has been a death be proved fully. This

[1] *General View of Criminal Law*, pp. 265—275.
[2] Cf. the case mentioned, *supra*, p. 334.
[3] *Reg.* v. *Dredge*, 1 Cox 235.
[4] 2 East P.C. 657; *Reg.* v. *Burton*, Dearsly 282.

again must be done either by direct evidence (*e.g.*, the finding of the body), or by circumstantial evidence of an exceptionally strong character[1]. Hale and Coke illustrate the importance of this rule by actual instances in which persons were executed for murder, and yet their supposed victims subsequently reappeared alive[2]. Hence in a case where the father and mother of a bastard child were seen to strip it and throw it into the Liverpool Docks, and the body could not afterwards be found, Gould, J., nevertheless advised that, as there was a bare chance that the child might have been carried out to sea by the tide and picked up alive, the parents ought not to be convicted of its murder[3]. It thus is usually necessary that the body, or some identifiable portion of it, should be found. A memorable instance of the identification of a mere portion occurred in a famous American trial of 1850; that of Professor Webster, of Harvard University, for the murder of Dr Parkman[4]. The body had been burnt in a furnace in the Professor's laboratory and the only identifiable portion left was the victim's false teeth; which fortunately were of a peculiar character.

[1] *Rex* v. *Hindmarsh*, 2 Leach 569.

[2] Hale P. C. c. xxxix.; 3 Coke Inst. 104 (K. S. C. 449).

[3] Cited in *Rex* v. *Hindmarsh*, loc. cit.

[4] *Supra*, p. 139; 5 Cushing. It may here be well to warn the student that the phrase *corpus delicti*—though often applied to the body of a murdered man, or the stolen goods, or any other subject-matter of criminal conduct—more properly means the criminal conduct itself, *e.g.* the act of killing the man, or of stealing the goods.

CHAPTER XXV.

THE GENERAL RULES OF EVIDENCE.

We now come to consider the chief general rules of evidence. They consist, as we have said, mainly of rules of Exclusion. And they are not limited to excluding such matters as are irrelevant to the issue to be tried. For even of relevant testimony there are two kinds which it is highly desirable to exclude[1].

(*a*) Evidence of matters so slightly relevant as not to be worth the time occupied in proving them. If every circumstance which might tend to throw light on the matters in issue were let in, trials would be protracted to an intolerable length; especially (as Maine says) in India, where extraordinary ingenuity is exhibited in discovering every fact which has the remotest bearing on a question that is to come under litigation.

(*b*) Evidence which, though relating to facts that are not only relevant but even important, is itself of such a character that experience shews it to be likely to impress persons of merely ordinary intelligence as being a more cogent proof of those facts than it really is. "Hearsay" affords a conspicuous example of this kind of evidence. The legal rules of evidence were probably developed in consequence of the gradual discovery by judges that certain kinds of proof were apt to be thus accepted, by inexperienced jurymen,

[1] Cf. Sir Henry Maine's *Speeches*, p. 426.

with a degree of respect which was undeserved. Hence an adherence to them was chiefly insisted upon in cases where it was by jurymen that the evidence was to be weighed. Accordingly where the functions of the Court alone are concerned, (as in determining the sentence for a convicted prisoner), facts are often taken into account which have not been established in accordance with the strict rules of evidence. Thus the law of evidence was not reduced to definite form until long after our forensic procedure had become familiar with the practice of producing witnesses to give evidence to juries. It was in civil courts that the rules of evidence first arose; and they thence passed to criminal courts, where, however, they came to assume an even greater importance than was accorded to them in civil ones.

This distinction has been rendered very much more emphatic in recent years. For, since the Judicature Act, 1873, the practice in civil courts is not to allow a new trial merely because of some wrongful admission or rejection of evidence, unless this error has caused "a substantial wrong[1]." But in criminal cases it is now settled[2] that a conviction is bad if any inadmissible evidence for the Crown be allowed to go to the jury, even though the evidence legally admissible was, without it, amply sufficient to support a conviction. The decision is all the more emphatic because, in the particular case, the evidence was not elicited by the prosecutor but spontaneously volunteered by the witness, and prisoner's counsel took no objection to its being received. The grounds of the decision are (i) that a court of criminal appeal has no means of determining how far the jury, in arriving at their verdict of conviction, were influenced by that portion of the evidence which was improperly put before them; and

[1] Rules of the Supreme Court; Order 39, Rule 6.

[2] *Reg.* v. *Gibson*, L. R. 18 Q. B. D. 537. This ruling was followed in *Reg.* v. *Saunders*, L. R. [1899] 1 Q. B. 490, although causing a clear failure of justice. Cf. *Rex* v. *Bridgwater*, L. R. [1905] 1 K. B. 131.

(ii) that no omission on the part of the prisoner's counsel can relieve the judge of his duty of preventing all inadmissible evidence from being laid before the jury. If any improper evidence is given, the judge should strike it out of his notes and should bid the jury pay no attention to it. In an extreme case, where the evidence has made too much impression to be counteracted thus, it may even be necessary for him to discharge the jury and re-try the prisoner before a fresh jury. Hence a prosecutor should not press for the admission of any evidence which is at all of doubtful admissibility. And, on the other hand, a prisoner's counsel should not be too eager to take objections to evidence; for he loses no right by not objecting, and every objection is apt to prejudice the jury, who are always inclined to resent any technicality which "closes the avenues to truth[1]."

A further distinction between the civil and the criminal views of the law of evidence is that its rules may in civil cases be waived, either by consent or by an order made on a summons for directions; but in criminal cases the rules of evidence are matters *publici juris*, and cannot be dispensed with by consent of the parties[2]. For, here, others than they have an interest at stake; not merely the single person accused but also every other inhabitant of the realm has an interest in seeing that the prisoner's liberty or life is not

[1] "Taking an objection to evidence sometimes creates an inference which is more injurious than the evidence itself would have been" (Cockburn, C.J.). In America objections are taken far oftener than here.

[2] *Rex* v. *Foster*, 7 C. and P. 495. But the quasi-civil character which the early law attached to mere misdemeanors (*supra*, p. 99), has occasionally led, in their case, to slight relaxations of this rule. Thus at the second trial of a charge of misdemeanor, the evidence given by a witness at the first trial has (by the consent of the prisoner) been taken unusually rapidly, being merely read over by the judge from his notes and then assented to *en bloc* by the witness (*Reg.* v. *Lovett*, 8 St. Tr. (N. S.) 1179). And similarly on trials for misdemeanor depositions have sometimes been admitted by consent, although the witness was neither dead nor ill, but merely gone abroad (*Rex* v. *Morphew*, 2 M. and S. 602). But such exceptions are now discouraged.

taken away except under the whole of the safeguards which the law has prescribed.

Our account of the rules of evidence will best be rendered intelligible if we first explain those fundamental doctrines which are applicable in all courts, whether civil or criminal, and then pass to the consideration of such rules as are peculiar to courts of criminal jurisdiction. The following are the fundamental principles which require our attention.

Rule I. *Omnia praesumuntur pro negante;* or, as the rule is more fully expressed by Justinian, "ei incumbit probatio qui dicit, non qui negat[1]."

Thus the creditor who claims a debt has the burden of proving it to be owed. Similarly, in any criminal accusation[2], the burden of proof always lies upon the accuser as regards the *actus reus,* and usually also as regards the *mens rea;* while the accused, on the other hand, is entitled to maintain "a sullen silence." And this duty of every affirmant to make out his case is so clearly imposed by law that, although questions of fact are for the jury, and not for the judge, yet the judge must not allow the jury to pronounce a verdict in the affirmant's favour if the only evidence he has produced is so slight that no reasonable man could accept it as establishing the fact which is to be proved. Thus if it is necessary to shew that a transaction took place on a Monday, and the evidence only shews that it took place "either on a Monday or else on a Tuesday," there would be no case which the judge could submit to the jury; (unless indeed this evidence were eked out by some presumption, as for instance, "omnia ritè esse acta"). Hence it may quite logically happen that a defendant may be acquitted, and yet that the witnesses against him, on being indicted before the same jury for perjury, may also be acquitted.

[1] *Dig.* xxii. 3. 2.

[2] *Rex* v. *Hazy,* 2 C. and P. 458 (K. S. C. 471); *Williams* v. *East India Co.,* 3 East 192 (K. S. C. 472).

Sometimes, however, this rule, that the burden of proof is on the affirmant, may happen to come into collision with the fundamental presumption of innocence[1], which throws the burden of proof on any person who alleges misconduct, even though his allegation of misconduct be a *negative* averment, a charge of omission. In such a collision of rules the presumption of innocence must usually be allowed to prevail; and the accuser will generally be required to give proof not only of his affirmations but even of his negations[2]. To this principle, however, a somewhat perplexing exception arises in those cases where the affirmative fact, which would disprove guilt, is one which (if it exists) lies peculiarly within the knowledge of the litigant whose interest it is that this guilt should be disproved. For in these peculiar cases, so soon as the accuser has given so much evidence as a reasonable man might consider to be sufficient to establish guilt, there then is cast upon the accused person the burden of producing his affirmative counter-evidence. Accordingly if he thereupon fail to produce that evidence, this failure may be taken into account as proving that no such affirmative evidence exists, and accordingly as corroborating the accuser's negative allegation. Thus in *Att.-Gen.* v. *Bradlaugh*, which was an action for penalties for acting as a Member of Parliament without having taken the oath, the informant made the negative allegation that the defendant had not such a religious belief as made him competent to take an oath, and the defendant refused to give evidence on this point. It was held that as the defendant could himself have disproved the assertion if it were not true, the jury were entitled to take into account the fact that he had not done so[3]. Similarly in divorce proceedings, the fact that the co-respondent is present in court, and yet does not go into the witness-box to assert his innocence, may legally be treated as corroborating (though only slightly) the accusation made against

[1] *Supra*, p. 326. [2] See cases cited *supra*, p. 343 *n*.
[3] *The Times*, July 1, 1884; same case on appeal, L. R. 14 Q. B. D. 667.

him. In like manner, in the proceedings, in 1820, on the allegation of adultery against Queen Caroline one of the circumstances which told in support of it was her failure to bring to England her attendant Bergami, the alleged adulterer, as a witness to her innocence[1].

The fundamental rule that an accuser must make out his own case is, however, quite reconcilable with this permission to draw hostile inferences from the defendant's silence, if we regard that silence as a fact never sufficient of itself to rebut so strong a presumption as that of innocence, but merely capable of being taken into account to corroborate other evidence, which might, even uncorroborated, have been legally sufficient to effect that rebuttal. The probative value of this fact of silence becomes the greater in proportion as the grounds of defence, about which the defendant is silent, lie the more particularly within his own knowledge. Thus on an indictment for misprision of treason, though it is for the Crown alone to prove that the prisoner knew of the treason, it yet may legally leave the prisoner to prove (if he can) that he discharged his consequent duty of disclosing it to some magistrate[2]. And similarly in proceedings for practising medicine without a qualification, or selling game without a licence, or producing a play without the author's consent, so soon as the active conduct alleged has been proved, it may then be left to the defendant to prove that he possessed the qualification or licence or consent[3].

The importance of this rule as to a defendant's silence has been greatly extended of late, since the Criminal Evidence Act, 1898[4], has allowed all accused persons to give evidence for themselves on oath. For, though this Act forbids counsel

[1] Lord Eldon, for instance, treats this failure as "amounting to a tacit admission," in his speech in the House of Lords on Nov. 2, 1820.

[2] *Rex* v. *Thistlewood*, 33 St. Tr. at p. 691.

[3] *Rex* v. *Turner*, 5 M. and S. 206 (K. S. C. 474).

[4] 61 and 62 Vict. c. 36.

to comment on the prisoner's not giving evidence, no such restriction is imposed upon the judge, and indeed jurymen are themselves usually on the alert to notice this silence.

It should be noted, in conclusion, that there are a few exceptional criminal cases in which the legislature has thrown upon the prisoner the *onus probandi* of a part of the issue. The following are instances:—

(i) By the Explosive Substances Act, 1883[1], it is a felony, punishable with penal servitude for fourteen years, to be in possession of any explosive substance under suspicious circumstances, unless the prisoner can shew that his possession was for a lawful purpose.

(ii) We have already mentioned the offence against the Vagrant Act which is committed by those who "sleep out," unless they can give a good account of themselves[2].

(iii) By 2 and 3 Vict. c. 71, s. 24 it is made an offence, to be in unlawful possession, in any street or public place, in the *Metropolitan* Police District, of goods which may reasonably be suspected of being stolen, unless the prisoner gives a good account of how he came by them; (punishable by two months' imprisonment, with or without hard labour).

Rule II. The mode in which testimonial evidence is given.

The admirable method adopted is one which was gradually developed by the common-law courts. They ultimately went unfortunately far in excluding evidence, but they elicited in the best possible manner all that was not excluded; (whilst in Chancery, far more evidence was always admissible, but the mode of elicitation was such as to render it all far less trustworthy). The witness must give his testimony not "spontaneously" but "responsively," *i.e.*, not in a consecutive

[1] 46 and 47 Vict. c. 3, s. 4.

[2] *Supra*, p. 322.

narrative, but by brief answers to brief successive questions. This method affords the opposing party an opportunity of objecting, before it is too late, to any question which tends to elicit an answer that would not be legally admissible as evidence. The questions moreover are put by counsel, and not by the judge[1]. But in French criminal trials, they are still put through the medium of the presiding judge, (for though the prisoner's counsel may, now, carry on an examination or cross-examination, he can only do so by getting the express leave of the judge for each question[2]); and the French Code of Criminal Procedure provides that a witness must not be interrupted in his answer. Hence, upon the trial of M. Zola (in connexion with the Dreyfus case) in February, 1898, more than one of the military witnesses made a continuous speech that occupied over a quarter of an hour; and General de Pellieux was called as a witness expressly on account of his extreme eloquence.

The questions proposed to a witness may occur in as many as three successive series.

(1) He is first "examined in chief" by the party that has called him; with the object of eliciting from him evidence in support of that party's view of the question at issue.

(2) He is then cross-examined by the opposite party; in order to diminish the effect of the evidence which he has thus given, and perhaps also to obtain evidence in support of the case of the party cross-examining; (for a cross-examination is not, as is sometimes imagined, limited to the scope of the examination-in-chief). Cross-examination

[1] Yet so late as *Lilburne's Case* (1649) a strong court told him that a prisoner might not cross-examine the Crown witnesses, but only suggest questions for the court to put; (4 St. Tr. at p. 1334).

[2] "With the result that his cross-examination becomes comparatively ineffective," wrote Lord Russell of Killowen, after attending the trial of Capt. Dreyfus at Rennes (*Life*, p. 320).

may reduce the effect of the evidence given in examination-in-chief either (1) simply by eliciting further facts which tend to harmonise that evidence with the case set up by the cross-examiner; or (2) by shaking that evidence itself. This latter effect may be produced by bringing the witness to admit that his opportunities of observing the facts narrated were inadequate, or that his character or bias is such as to make it unwise to rely on his veracity, or again, by involving him in such inconsistencies of statement as to make all such reliance impossible on (at any rate) this particular occasion[1].

(3) Finally, a witness who has undergone cross-examination may be re-examined by the party who originally called him; in order to shew the real meaning of the evidence elicited by the cross-examination. A re-examiner may, for instance, get the witness to explain any ambiguous expressions which he may have used on cross-examination, or his motives (*e.g.*, provocation) for any conduct which he may have admitted when under cross-examination[2]. Thus, if the cross-examiner has asked, "Didn't you once assault a neighbour?" the re-examiner may ask, "What had your neighbour done to you that made you assault him?" Or if the witness has been asked in cross-examination, "What are you to receive for coming here to-day?" the re-examiner may ask, "And is that sum only a fair compensation for your loss of time?" But re-examinations are limited strictly to the matters that have been elicited in the cross-examination. Hence, in an action against a ship-owner for negligence in his mode of loading a cargo, after a witness for the plaintiff had stated that deck-loading was perilous, and had consequently been asked by the cross-examiner, "Isn't it usual in summer voyages?" it was held not to be permissible for the

[1] Quintilian's instructions on the cross-examination of witnesses still retain all their value; *Inst. Orat.* v. 7.

[2] *Queen Caroline's Case*, 2 B. and B. 297.

re-examiner to ask, "Are those summer deck-cargoes carried at the risk of the ship-owner or of the cargo-owner?" For such a question would go beyond the range of the cross-examination and open up a new inquiry.

It should be added that if either an examiner-in-chief or a cross-examiner has elicited from a witness some portion of a conversation or of a document, (even though he may have brought out all that it was legally permissible for *him* to ask for), his opponent becomes entitled to elicit (in his subsequent cross-examination or re-examination) all the rest of that conversation or document, so far as it concerned the same subject. Thus if the examiner-in-chief asks, "Why did you go to that house?" and receives for answer, "Because of a remark my brother made to me," *he* cannot go on to ask what this remark was, (for that would be to adduce hearsay evidence): but the opposite party, when he comes to cross-examine, will be fully entitled to ask.

Rule III. Questions put to a witness by the counsel who produces him, (whether in examination-in-chief or in re-examination), must not be "leading" ones[1].

A question "leads" if, though it admits of several answers, it suggests that a particular answer is desired by the questioner. Thus an examiner-in-chief must not ask, "Did the noise last long?" but, "How long did the noise last?" not, "Was it a wet day?" but, "What sort of a day was it?" not, "When he was leaving, did he offer you £5?" but, "When he was leaving what did he do?" Leading questions are objectionable because (1) to a false witness they suggest what particular lie would be desirable; and (2) even an honest witness is prone to give an assenting answer from mere mental laziness. But these objections are not

[1] Leading questions were objected to even as early as the trial of Lilburne in 1649. The Attorney-General having asked a witness such a question, Lilburne interposed, "I pray, Sir, do not direct him what to say, but leave him to his own conscience and memory" (5 St. Tr. 1337).

likely to apply to a cross-examination so leading questions are consequently permitted there. To certain portions of the ordinary examination they similarly are inapplicable; and therefore, as leading questions save much time, they are allowed even in examination-in-chief in the following cases.

(1) As to undisputed matter; *e.g.*, the name, address, and occupation of a witness. If a fact has been deposed to by a witness, and he has not been cross-examined about it, this may *primâ facie* be taken to imply that the fact is undisputed, and accordingly that subsequent witnesses may be "led" with respect to it.

(2) As to the identity of persons or things; *e.g.*, "Is this the watch that you missed?" Thus an examiner may ask, "Is the prisoner the man you saw running away?" Yet this would be an imprudent question; as the jury would be more fully impressed if counsel asked first, "Would you recognise the man?" and then bade the witness point him out.

(3) For the purpose of contradicting the account which some previous witness, *A*, has given of his own statements, a subsequent witness, *B*, may be asked a leading question; as, "Did *A* say so-and-so?"

(4) Sometimes a witness, in the course of his examination-in-chief, shews himself to be hostile to the party producing him—meaning thereby, not that he merely gives evidence which is at variance with that party's case, but that he shews an evident unwillingness to disclose what he knows in favour of it. Thereupon the judge may, if he think fit, permit the examiner to contend with this unwillingness by asking leading questions.

(5) If the witness merely proves to be forgetful, no such permission will be given to ask questions that are strictly leading ones; yet after an examiner-in-chief has thoroughly tested and exhausted his witness's memory, he will usually

be allowed to suggest points for recollection[1], *e.g.*, even to ask, "Was nothing said on the subject of the... ?"

Rule IV. A witness speaks to his Memory and not to his reasoning.

What, however, he remembers will be admissible in evidence even though his recollection of the facts is only weak; (but, of course, its value may consequently be trifling). Thus in *Lord Melville's Case*[2] it was held that, where a witness was not able to swear positively but had a very slight remembrance, this was legal evidence. And on an important trial[3] a letter as evidence was admitted though the witness to its authorship could go no further than to say, "It is in a disguised hand; I believe it to be his writing, but I would not like to swear positively to it."

But it is only for his memory that a witness is brought into court, and not for his powers of judgment; (unless he be called as a scientific expert, *e.g.*, a chemist or pathologist in a case of poisoning). Hence an ordinary witness must not be asked, either in examination-in-chief or in cross-examination, to draw inferences. "Could you see if the fisherman's clothes dripped?" may be a proper question; but, "Could you see whether he had been in the water?" will not be. Hence, on reminding a witness that his answer is a contradiction of the evidence which some previous witness has given, even to ask him, "If *A* says the contrary to what you have just told us, is what he says untrue?" is, strictly speaking, to ask what he need not answer. Similarly a cross-examiner has no right to ask, "Did you go to the prisoner's house as a spy[4]?" for this is a matter not merely of facts but of the view to be taken of those facts. Yet he may ask under what directions the witness went there, for what

[1] Cf. *Courteen* v. *Touse*, 1 Camp. 43. [2] 29 St. Tr. 740.

[3] Before a Special Commission consisting of four judges; *Reg.* v. *Simon Bernard*, 8 St. Tr. (N. S.) at p. 981; cf. p. 927.

[4] *Reg.* v. *Simon Bernard*, 8 St. Tr. (N. S.) at p. 935; 1 F. and F. 240.

purpose he went, what he did when there, what report he afterwards made to those who employed him; and then, on the strength of the answers to these questions, he may, in his subsequent address to the jury, insist that the conduct of the witness must be regarded as that of a spy.

Rule V. Evidence must be relevant; *i.e.*, it must be confined to the question at issue.

A party may prove all circumstances that are relevant to the facts in issue, but no others[1]. The circumstances thus relevant consist not only of those which form part of the facts in issue themselves, but also of all such further circumstances as may be necessary to identify or to explain these[2]. This will include, for instance, in a criminal case, not only the prisoner's commission of the crime and his guilty knowledge, but also—as facilitating a belief in these—his opportunities, motives, and subsequent conduct, and the credibility of the witnesses produced at his trial.

Thus, where a prisoner, accused of murder, bore the somewhat unusual surname of Lamson, evidence was admitted that luggage had been deposited in that name on the day of the murder, at a railway station near the place where it was perpetrated; the circumstance being held to be relevant because it was proof of opportunity, though very slight proof[3]. Not only is the prisoner's own conduct relevant, but so soon as it has been shewn that others were combined with him in carrying out a joint criminal purpose, evidence may be given of any conduct of their's which forwarded this joint purpose, even though such conduct took place in the prisoner's absence and though they are not indicted along with him[4]. This rule is of specially frequent application on trials for conspiracy[5]; but is by no means confined to them. Thus if

[1] *Per* Parke, B., in *Wright* v. *Doe*, 7 A. and E., at p. 384.
[2] See Mr W. Wills' *Law of Evidence*, p. 89.
[3] *Reg.* v. *Lamson*, C. C. C. Sess. Pap. xcv. 572.
[4] *Rex* v. *Stone*, 6 T. R. 527; *Rex* v. *Winkworth*, 4 C. and P. 444.
[5] *Rex* v. *Hammond*, 2 Esp. 718 (K. S. C. 411).

A be indicted for uttering counterfeit coin, evidence may be given of his accomplice *B* going into a market and passing it there, though *A* himself did not go. Similarly, if *A* and *B* have agreed that *B* shall obtain goods at a shop by a false pretence, what *B* says in the shop may be given in evidence against *A*, though he was not there, and even though *B* is not indicted along with him.

The legal limits of relevancy exclude much evidence which, in non-legal matters, would be thought very cogent. Thus if the question at issue be as to how a man acted on one occasion, evidence of the way in which he acted on some other similar occasion is not considered sufficiently relevant to be admissible. Accordingly in civil courts, in a dispute as to what the terms of a contract were, a litigant cannot corroborate his account of them by giving proof of the terms of other contracts which his opponent made on the same subject-matter with other persons[1]. Yet evidence of these other contracts would have been quite admissible had the dispute related—not, as here, to what the opponent actually said when making the present contract, but—to what was his state of mind when making it; *e.g.*, whether or not it was with a fraudulent intent that he introduced into it some ambiguous terms[2].

And in criminal courts the same principle serves to exclude evidence of the prisoner's past offences. It is true that evidence of his *good* character is always regarded as relevant[3]; perhaps because in the chief Anglo-Saxon mode of trial, (viz., by compurgation), it was practically the only evidence the law demanded of him. But his *bad* character is not regarded as similarly relevant to the question whether

[1] *Hollingham* v. *Head*, 4 C. B., N. S., 385. Cf. *Holcombe* v. *Hewson*, 2 Camp. 391, where the fact that the beer which *A* had sold to *C*, *D*, and *E*, was good, was held to be irrelevant to the question whether that which he had sold to *B* was also good.

[2] *Barnes* v. *Merritt*, in the Court of Appeal, June 15th, 1899.

[3] *Reg.* v. *Rowton*, L. and C. 520 (K. S. C. 528).

he committed the *actus reus*[1]. Consequently evidence of other (even though precisely similar) offences of which he has been guilty[2] cannot be given in order to corroborate the proof of his having committed this one. Yet such evidence was readily admitted so recently as the time of Sir Matthew Hale; and in French criminal procedure[3] it plays a most important part.

Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner's having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant[4]. Thus the burglary for which a man stands indicted may be brought home to him by shewing that a cigar case, which the burglars left behind them in the house, had that day been stolen from its owner by *him*. Or, for the purpose of shewing the motive of the present offence, some other crime may be disclosed[5]; as where a murder is accounted for by proving that the deceased had been an accomplice with the prisoner in some previous crime, and consequently was a person to be got rid of[6]. And the subsequent conduct of a prisoner, relevant as throwing light upon his offence, may include some further crime; as where a thief, on being arrested, shoots his arrestor[7].

Moreover, a distinction similar to that which we have already noticed in civil courts[8] holds good in criminal ones. Whilst the fact of a prisoner's having committed other similar offences is not relevant to the question whether he com-

[1] "A man's general bad character is a circumstance common to him with hundreds and thousands of other people; whereas the opportunity of committing the crime, and facts immediately connected with it, are marks which belong to very few." Stephen, *Gen. View*, 1st ed., p. 309.

[2] *Rex* v. *Birdseye*, 4 C. and P. 386 (K. S. C. 481).

[3] Stephen, *Gen. View*, p. 457.

[4] *Rex* v. *Ellis*, 6 B. and C. 145 (K. S. C. 481).

[5] *Reg.* v. *Neill*, C. C. C. Sess. Pap. cxvi. 1417 (K. S. C. 483).

[6] *Rex* v. *Clewes*, 4 C. and P. 221.

[7] C. C. C. Sess. Pap. xci. 181.

[8] *Supra*, p. 353.

mitted the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act—his *mens rea*. Such evidence has long been regarded as admissible in the case of those classes of offences in which the defence is peculiarly likely to take the form of a denial of *mens rea*; as, for instance, uttering false coin, embezzlement, receiving stolen goods, false pretences[1]. And recently its admissibility has been recognised as a general rule; in no way limited to peculiar classes of crime. For, on the indictment of a baby-farmer for the murder of a particular child, the Judicial Committee[2] held that the Crown might put in evidence (i) that the bodies of other infants also had been found secretly buried on the premises occupied by the prisoner; and (ii) that several infants had been received by him on payment of inadequate sums similar to that paid in the case of the particular child for whose murder he was indicted. In one instance the legislature has even extended this principle to evidence of offences that are not of a precisely similar kind. For by the Prevention of Crimes Act, 1871[3], on indictments for receiving stolen goods, as soon as it has been established that the prisoner did have possession of the stolen property, the fact of his having been convicted, within five years previously, of "*any* offence involving fraud or dishonesty" is admissible to shew guilty knowledge.

By a distinction precisely the converse of that which is

[1] *Reg.* v. *Francis*, L. R. 2 C. C. R. 128 (K. S. C. 492). Evidence may be given even of crimes *subsequent* to the one under trial; *Reg.* v. *Rhodes*, L. R. [1899] 1 Q. B. 77.

[2] *Makin* v. *Att.-Gen.* (for New South Wales), L. R. [1894] A. C. 57 (K. S. C. 485). Even before this decision, there had been some trials for murder at which evidence of previous attempts by the prisoner to commit murder had been held admissible to negative the defence of Accident; *e.g.*, *Reg.* v. *Gearing*, 18 L. J., M. C. 215; *Reg.* v. *Neill*, loc. cit. See also 2 C. and K. 308—309.

[3] 34 and 35 Vict. c. 112, s. 19.

thus applied in the case of a prisoner's character, the badness of a *witness's* character is always relevant, but its goodness is not. For the party by whom witnesses are produced cannot (in the first instance) corroborate them by offering proof of their good character or even of their having on former occasions told the same tale they now tell[1]. But the party hostile to these witnesses may discredit their characters, or may prove that at one time they told a different story. Sometimes this is done by mere cross-examination, sometimes by evidence. Thus the hostile party may call evidence to shew:—

(1) That the witness is notoriously mendacious. This practice is now very rare; for it was decided in *Rex* v. *Watson*[2] that no evidence can be given of any particular misconduct of his, and the only question to be asked is the vague general one, "Is he to be believed on his oath[3]?"—as if mendacity were a fixed habit that did not vary with subject-matter and with personal interests. (The party who has produced the witness can never discredit him thus, even if he turn out utterly hostile.) When such evidence is given it entitles the other party to contradict it by bringing proof of his witness's good character for veracity[4].

(2) That he is biassed[5]. Bias may, for instance, be shewn by evidence that the witness has received money, or

[1] Similarly, evidence to corroborate a prisoner's defence by shewing that he told his present story before ever he was accused, is considered too remote to be relevant. In Mrs Maybrick's case, Stephen, J., said, "Its admission is essentially reasonable; but the law does not allow it." Yet it may perhaps be doubted whether it would be wise to admit such evidence; inasmuch as it could always be easily created on purpose by a far-seeing offender.

[2] In regard to the discrediting of the spy, Castles; the celebrated cross-examination of whom by Sir Charles Wetherell deserves study; 32 St. Tr. 284.

[3] 32 St. Tr. 486; *Reg.* v. *Brown*, L. R. 1 C. C. R. 70.

[4] In *Elisabeth Canning's Case*, the witness Fortune Natus was discredited thus, and afterwards thus recredited, 19 St. Tr. 588, 595.

[5] *Att.-Gen.* v. *Hitchcock*, 1 Ex. R. 94.

has offered money to other witnesses; or that he has threatened revenge[1]. And even mere relationship to the litigant who produces him is some evidence of bias[2]. But no proof of bias can be given unless the witness has been cross-examined on the point, so as to have had an opportunity of explaining the circumstances.

(3) That on some relevant fact, to which he now deposes, he had previously made a statement inconsistent with what he now says. Here, again, before proof can be given of the discrediting statement, the witness's attention must be specifically drawn to it in cross-examination, in order that he may, if possible, explain it[3]. In criminal cases this mode of discrediting is an especially frequent one; because most of the witnesses at the trial have already given evidence, viz., at the preliminary examination before the justice of the peace who committed the prisoner for trial. At common law, if the previous statement were in writing (*e.g.*, a deposition at this examination for commitment), the cross-examiner had to put it in as part of his own evidence, (thereby giving the other party a right to a speech in reply), before even asking the witness about it. But now by statute[4] he need not put it in, unless he desires actually to contradict what the witness says in cross-examination. And the judge may use it for such a contradiction, although the cross-examiner has not put it in.

Even the party who produces a witness is allowed to discredit him by thus proving a previous inconsistent statement of his, should he turn out to be (in the opinion of the judge himself) hostile to that party. And, even without any such recognition of his hostility, the assertion which he now makes may be contradicted by the subsequent

[1] *Rex* v. *Yewin*, 2 Camp. 637 (K. S. C. 548).
[2] *Thomas* v. *David*, 7 C. and P. 350 (K. S. C. 544).
[3] *Angus* v. *Smith*, Moo. and M. 473.
[4] 28 and 29 Vict. c. 18, s. 5.

witnesses, called on the same side, if it be a fact which is intrinsically relevant to the issue. For clearly those witnesses who could have spoken to this fact if they had been examined before he was, cannot be excluded by the mere accident of his having been called first[1].

Besides these three modes of discrediting a witness by the evidence of other persons, his credit may be shaken by his own cross-examination, and shaken in a manner much more extensive. For he may be cross-examined not only on the matters already mentioned—his mendacity, his bias, his former inconsistent statements—but as to any past conduct of his of a discreditable character. This rule is often made use of to elicit facts which are admissible for this purpose, with the object of really employing them on account of their bearing upon the main issue in the case; though that bearing is too remote to suffice to render them legally admissible as evidence relevant to it. Thus on an indictment for ravishing *A*, a letter written to the prisoner immediately afterward by *A*'s father, demanding a pecuniary compensation, cannot be put in evidence to discredit *A* herself, (unless there be legal proof that she authorised its being written); but, if her father be called as a witness he can be asked about it, to discredit him, and it will thus effect, indirectly, the more important result of discrediting her.

It must be noted that the answers which a witness gives to questions that are put merely to discredit him, are "final," *i.e.*, the cross-examiner cannot call evidence to disprove them; for thus to digress into the determination of side-issues might render a trial interminable. (The legislature has, however, created an exception in one case, in which the disproof is peculiarly simple and peculiarly important; for by 28 and 29 Vict. c. 18, if a witness denies, or refuses to answer about, having been convicted of a crime, evidence of that conviction

[1] *Greenough* v. *Eccles*, 5 C. B. (N. S.) 803; cf. 4 B. and Ad. 197, and 8 Bing. 50. See, too, *Coles* v. *Coles*, L. R. 1 P. D. 70.

may be given.) If, however, the discreditable act were relevant not merely to credit but also directly to the actual issue in the litigation, evidence might of course be given, in regard to it, in contradiction of the witness; for such evidence would have been intrinsically admissible even if he had never been examined.

For instance on an indictment for rape, if the prosecutrix be cross-examined as to her unchastity with third persons, and deny it, she cannot be contradicted; and consequently, witnesses to her good character cannot be called by the prosecution to confirm her denial. But if the question had related to her previous unchastity with the prisoner himself, or to her being a common prostitute, her denial might be contradicted; for these facts, if true, would not merely affect her credit but would be relevant to an essential part of the issue, viz., whether the act now complained of took place against her will[1]. Similarly if in cross-examination a witness denies having been drunk at the time when he watched the events that are in issue, he may be contradicted on this point by direct evidence.

Thus evidence can be called to contradict a witness only as to his answers about (1) his bias, or (2) his own previous inconsistent statements, or (3) facts which the opposite party could have proved as part of his own case.

Rule VI. The best evidence must be given or its absence must be accounted for.

The rule is usually stated, by writers and by judges, in this general language; but its actual application is limited to one particular case, viz., the proof of the contents of a written document. The bare fact that the document has actually been drawn up[2], or the mere condition of it, may be proved by secondary evidence, that is, by the production, not

[1] *Reg.* v. *Riley*, L. R. 18 Q. B. D. 481.
[2] *Jolley* v. *Taylor*, 1 Camp. 143 (K. S. C. 494).

of the document itself, but of remoter evidence derived from it through some intermediate channel; such evidence, for instance, as copies made from it, or the recollections of a witness who has seen it. But if, on the other hand, it is desired to prove what the actual contents of the document were, then the rule now under discussion excludes all mere secondary evidence. Thus where it is sought to give the contents of a message sent by telegram in evidence against the sender of it, the original paper handed in by him at the post-office must be produced. The subsequent paper, which the telegraph boy delivered at the house of the receiver of the telegram, cannot be given in evidence for this purpose, (unless it be proved that the first-mentioned paper has been destroyed or lost[1]). It, however, would be otherwise if the object were to prove not what message was sent, but what message was in fact received; for then the positions would be reversed, and the paper brought by the boy would be the necessary "best evidence."

Accordingly when, in any litigation, a witness is asked, "Was any bargain made on this subject?"—the opposing counsel will probably interpose by asking, "Was it made in writing?" For if it were embodied in written words, the witness must not give parol evidence about them. Thus a witness, as Lord Eldon said, "may be asked whether a particular house was purchased and conveyed; but, if he states that it was conveyed by a written instrument, then the examination must stop there." Similarly it would not be permissible to ask, "Did you write a note to your master asking to be taken back into service?" for that would be to elicit the contents of the note without producing it. The utmost that the examiner can do will be to ask, "After leaving your master's service did you write to him?" and, on getting an affirmative answer, to proceed; "After so writing, were you taken back into his service?"

[1] *Reg.* v. *Regan*, 16 Cox 203.

But the rule only applies where the object desired is to prove what actually were the contents of a document. Hence where words have been uttered orally, by a person who apparently read them out from a paper, if the object be to shew, not what the words of the document itself were, but what he actually did utter, any persons who heard him may narrate what they heard, and his paper need not be produced. For the words he uttered may have varied from the written ones[1]. Similarly, such a question as, "What did you tell your clerk to state in the letter?" would be quite permissible, if the point to be proved be not the actual contents of the letter, but merely what the witness intended those contents to be; (as, for instance, where the only object is to shew his knowledge of the matters thus mentioned by him to the clerk[2]).

It will, however, sometimes happen that no primary evidence is available. In that case the production of the document will be dispensed with, and secondary evidence may take its place. The following are the most frequent instances in which this occurs.

(1) When the writing has been destroyed; or where, after proper search having been made for it[3], it cannot be found. Thus on a trial for forgery the contents of the note, which was alleged to have been forged, were allowed to be proved by parol evidence, because the prisoner had himself swallowed the note[4].

(2) When its nature is such that it is physically impossible to produce it; as in the case of a placard posted on a wall[5], or of a tombstone. This has at times been extended to cases where it was not absolutely impossible, but only extremely inconvenient, to produce the writing; as when,

[1] *Rex* v. *Sheridan*, 31 St. Tr. 673—674; *Rex* v. *Dewhurst*, 1 St. Tr. (N. S.) 558.

[2] Cf. *Rex* v. *Thistlewood*, 33 St. Tr. 757.

[3] *Brewster* v. *Sewell*, 3 B. and A. 296.

[4] 14 East 276.

[5] *Rex* v. *Fursey*, 6 C. and P. at p. 84 (K. S. C. 384).

in *Rex* v. *Hunt*[1], parol evidence was admitted of the inscriptions on the banners and flags that had been displayed at a meeting.

(3) When the writing is in the possession of the opposite party and, though notice has been given to him to produce it, he fails to do so[2]. Sometimes the very nature of the litigation is of itself a sufficient notice to him that his opponent expects him to produce the document.

(4) When the secondary evidence which is tendered consists of an admission, by the opposite party himself, as to what the contents of the document were[3].

(5) When the original is a "public" document, it is now provided by statute, that it may be proved by means of an examined copy[4].

(6) When the original is an entry in a banker's book it is now provided by statute that it may be proved by a copy of the entry, if verified by some officer of the bank either orally or even by mere affidavit[5].

The rule goes no further than simply to postpone all secondary evidence whatever of the contents of documents to the primary evidence of them. It takes no heed of the different degrees of value of various kinds of secondary evidence[6]. For instance, it will allow a witness to give his mere recollections of the contents of a document, even when some attested copy of it is available. And the rule ceases to have any operation at all, where the Thing under discussion is not a written document. For where, in any litigation, the quality or condition of some chattel is in dispute, the law does not similarly require the chattel

[1] 3 B. and A. 566.
[2] *Rex* v. *Watson*, 2 T. R. at p. 201.
[3] *Earle* v. *Picken*, 5 C. and P. 542.
[4] 14 and 15 Vict. c. 99, s. 14.
[5] 42 and 43 Vict. c. 11.
[6] *Doe* v. *Ross*, 7 M. and W. 102, 106.

itself to be produced in court for actual inspection[1]. If the purchaser of a horse, or of a diamond-ring, or of corn, refuses payment of the price because the animal is unsound, or the jewel is false, or the grain does not come up to sample, he need not produce the horse, or the ring, or the sample; (though he will arouse suspicion by not producing it[2]). Similarly, in an action to recover compensation for the damage sustained by a bicycle which a cart has run down, it will not be necessary at the trial to produce the bicycle. Equally little is any such principle applied to the proof of handwriting; for it is not essential that the party, who is alleged to have signed a document, should himself be called to prove, or (as at a trial for forgery) to disprove, his handwriting[3]. And, as we have seen, to prove that a person holds a public office, (*e.g.*, that of a justice of the peace or of a solicitor), it is sufficient to give evidence that he is in the habit of acting as a holder of it, without producing the written commission by which he came to hold the office.

Finally it may be noted, as a further illustration of the limited application of the "best evidence" principle, that the law does not prescribe any preference between different species of Primary evidence. Thus the testimony of a witness who had watched through a telescope an assault, which took place a mile away[4], would not be postponed to the testimony of the actual victim of the attack.

Rule VII. Hearsay evidence is inadmissible. That is to say, a witness who has received from some one else a narrative of facts, even though they be the very *facta probanda*, is not allowed to give this narrative in evidence.

The untrustworthiness of mere Hearsay appears to have been recognised in England as early as 1202; and in the same century Bracton repeatedly disapproves of all such

[1] *Reg.* v. *Francis*, L. R. 2 C. C. R. 128 (K. S. C. 492).

[2] *Armory* v. *Delamirie*, 1 Str. 504. [3] *Rex* v. *Hughes*, 2 East P. C. 1002.

[4] See in *The Times* of Feb. 26th, 1901, an instance of such a witness.

"testimonium de auditu alieno[1]." Yet when, in course of time, the procedure of trial by jury and witnesses became established, hearsay evidence was at first freely admitted. Thus, in 1603, on the trial of Sir Walter Raleigh, a witness was allowed to narrate that "Mr Brooke told me he had heard of a most dangerous plot," and that "a Jesuit, who was in company with honourable lords, whispered one of them in the ear saying, that..." etc. But in 1660[2], we find hearsay only received after direct evidence has been given, and merely to corroborate it; and thus not admissible of itself. And within another generation the full modern principle of exclusion had become accepted—probably the earliest of all the rules of evidence—for in 1683, the one caution which Algernon Sidney's counsel could furnish him with was to bid him, "Desire that evidence of Hearsay from witnesses may not be given; and *suffer it not* to be given." Accordingly in 1684, Lord Jeffreys, C.J., says[3], "What the witness heard from the woman is no evidence. If she were here herself and did say it, but not swear it, we could not hear her; how then can her saying it elsewhere than here be evidence before us? I wonder to hear any man that wears a gown make a doubt of it!"

Yet in continental countries, even now, hearsay evidence remains acceptable. In the Dreyfus case the great bulk of the evidence given was the merest hearsay[4]. For on the

[1] Pollock and Maitland, II. 620. The Romans recognised its defects even in the time of Plautus: "Pluris est oculatus testis unus quam auriti decem: qui audiunt, audita dicunt; qui vident, plane sciunt." Plaut. *Trucul.* II. 6. Yet in 1598 even Bodin said, "In cases of witchcraft, common repute is almost infallible"; (*Démonomanie*, IV. 4).

[2] At the trial of the regicide Hulet, 5 St. Tr. 1195.

[3] 9 St. Tr. 1189.

[4] In a recent famous Belgian trial the following fifth-hand evidence was received, "He told me that Mme. Lagasse had heard from a lady that Van Steen told her he knew the prisoners were guilty." In the great French case of Calas, A.D. 1762 (*Encyc. Britannica*, Art. *Calas*), his threat to murder was only proved at *seventh*-hand.

continent, as in Scotland, trial by jury was not introduced until so late an epoch that the admission of hearsay had become a practice too inveterate to be shaken. Before that introduction it was comparatively innocent, for when trained judges are to determine the facts in dispute they can trust themselves to give hearsay evidence only its due weight[1].

The peculiar (and emphatic) exclusion of hearsay in England is due to its evident untrustworthiness, since it is derived ultimately from an absent witness who was not on oath and did not undergo cross-examination[2]. And the exclusion is further justified by the necessity of avoiding that prolongation of trials which would be produced by the admission of a range of evidence, so indefinitely wide, and yet of such trifling value.

Hearsay usually appears in the shape of some other person's written or oral statements; but evidence of his mere conduct, unaccompanied by any statement, will be rejected on the same principle, if it be adduced for the same purpose, viz., of shewing his state of mind with regard to some fact which it is sought thereby to prove. As was said by Baron Parke[3], the conduct of a deceased sea-captain, who examined every part of a vessel and then deliberately embarked in her with his family, cannot be given in evidence to shew that she must have been seaworthy.

It is important to notice that the rule only excludes evidence about such statements or conduct as are merely narratives of a fact that is in dispute in the litigation; but not evidence about such statements or conduct as actually constitute in themselves such a fact. Thus in an action for slander, a witness can of course narrate the defamatory words which were uttered, for they are a main part of the issue. And, similarly, evidence may be given of any statement

[1] Cf. Lord Mansfield's remarks in the *Berkeley Peerage Case*, 4 Camp. 415.
[2] See *Rex* v. *Eriswell*, 3 T. R. 707 (K. S. C. 495).
[3] *Doe d. Wright* v. *Tatham*, 7 A. and E. at p. 388.

which, though not itself constituting a fact relevant to the issue, nevertheless accompanied some act which does. For such a statement must throw light upon the character and purpose of this act[1], and is itself a part of the "res gestae." It is not necessary that it should have been uttered by the very person who did the act. It is sufficient if it were uttered in his hearing, and he may be taken to have assented to it; as when evidence was given against Lord George Gordon[2] in the case of the seditious cries uttered by the rioters whom he led. Similarly not only the remarks made by persons engaged in drilling, but also those made by persons who were watching them drill, have been allowed to be given in evidence against the former to shew the illegal purpose of the drilling[3]. And when a libellous picture has been exhibited in public, remarks uttered by the spectators whilst looking at the picture may be given in evidence to shew whom the figures in it were meant to represent[4]. But the rule is confined to utterances that are strictly simultaneous with the *res gestae*[5]; and even such as are made only a few minutes after the transaction is over will be regarded as mere narratives, and accordingly excluded[6].

In some cases a complaint, although not uttered till some time after the conduct complained of, is admitted as evidence. But this is only allowed after the person complaining has given testimony as a witness in the case; and, even then, only for the purpose of corroborating that testimony (by shewing the complainant's consistency of conduct), and not as being intrinsically any evidence at all of the alleged act complained of. Thus in a wife's suit for judicial separation, on the ground of cruelty, the question, "Did the petitioner complain to you of her husband's cruelty?" is always allowed to

[1] *Per* Bayley, J., in *Redford* v. *Birley*, 1 St. Tr. (N. S.) 1244.

[2] 21 St. Tr. 535.

[3] *Redford* v. *Birley*, 1 St. Tr. (N. S.) 1071.

[4] *Du Bost* v. *Beresford*, 2 Camp. 511 (K. S. C. 497).

[5] *Aveson* v. *Lord Kinnaird*, 6 East 198 (K. S. C. 498).

[6] *Reg.* v. *Bedingfield*, 14 Cox 341 (K. S. C. 501).

be put (even by the examiner-in-chief) to such of her witnesses as are examined subsequently to herself. And, in the same way in cases of violent assault, (*e.g.*, rape), evidence that the person assaulted subsequently made a complaint about it, is admitted if that person has been examined as a witness. Till recently it was doubted whether anything more than the simple fact that some complaint had been made could be given in evidence; but it is now decided[1] that even the details of the complaint are admissible. The precise scope of this decision is, however, still far from clear; opinions differing as to whether it is to be followed in civil courts also, or only in criminal ones; and as to whether it is to apply to all crimes, or only to personal, or to sexual, ones[2].

There are, however, some well-ascertained and much more important cases in which mere hearsay, (*i.e.*, a narrative of the past), is freely and fully admitted as evidence. Of these exceptions we may now discuss such as are accepted equally in civil and criminal tribunals; (postponing for the present some others which only concern the latter). The following deserve careful attention:—

(1) Admissions made by, or by the authority of, the party against whom they are produced. (The term "admission" is here used in the wide sense, which it always bears in civil cases; though in criminal cases it is usually applied only to those individual details of fact which do not involve the criminal intent, an admission of full guilt being styled

[1] *Reg.* v. *Lillyman*, L. R. [1896] 2 K. B. 167 (K. S. C. 503). The complaint must be spontaneous, *e.g.*, not caused by leading questions. And must perhaps not be *written* complaint; for the recipient has not the opportunity of noticing the complainant's demeanour; *Reg.* v. *Ingrey*, 64 J. P. 106. So Wright, J. (at the Lincoln Assizes of July, 1900), refused to allow a letter, written only four hours after the occurrence, to be put in, though he did not actually rule it to be inadmissible in strict law.

[2] *Rex* v. *Osborne*, L. R. [1905] 1 K. B. 551, shews that its application is *not* limited to those sexual crimes in which Consent would be a defence.

in criminal cases a "confession.") The authority need not expressly relate to the particular statement; so a man will be responsible for any admissions made on his behalf in the ordinary course of business[1] by his partner or his agent, or even by some one to whom he has referred some third person for information on the subject concerned[2].

An admission may be made either expressly, in words (either spoken or written), or tacitly, by mere silent conduct. An instance of an express admission is furnished by the case of *Maltby* v. *Christie*[3]. One party to the case, who was an auctioneer, had issued a catalogue in which he described certain goods as being the property of a bankrupt; and this fact was held to render it unnecessary for the other party to produce any further proof that the person to whom they belonged had really become bankrupt. Tacit admissions present more difficulty. An instance of one would arise if a man were shewn to have posted to his mother a copy of a newspaper which contained an account of his wedding[4]. He may reasonably be inferred to have posted it in order to announce his marriage; and his doing so constitutes a tacit adoption of the newspaper's statements. Hence on his indictment for bigamy, they will be evidence to connect him with this marriage, (alike whether it be the first one or the criminal one). A less simple but more familiar illustration is afforded whenever a statement is uttered in the presence of some one who would naturally contradict it if it were not true, and who nevertheless remains silent. *Qui tacet consentire videtur*; he impliedly admits its truth. In this way, hearsay is often rendered admissible by the question, "Was the other party [to this litigation] present when you heard that man say this?" Thus in an action for

[1] *Rapp* v. *Latham*, 2 B. and A. 795.
[2] *Williams* v. *Innes*, 1 Camp. 364 (K. S. C. 507).
[3] 1 Esp. 340 (K. S. C. 506).
[4] *Reg.* v. *McCafferty* (Chamney's *Irish State Trials of* 1867, p. 660).

breach of promise of marriage, if the plaintiff was heard to say to the defendant, "You always promised to marry me," his mere silence is sufficient corroboration of her statement[1]. Yet the mere fact of the other party's having been present will not let in this evidence, if the circumstances were such as to make it unlikely that he would contradict the statement even if he knew it to be false[2]. And since the act of admission lies purely in his demeanor, (*e.g.*, his silence), and the statement uttered before him only becomes admissible as accompanying and explaining that demeanor, it follows that if his conduct involves no admission—*e.g.* if he at once denies the truth of the assertions—then, though uttered in his presence, they cannot be taken as evidence against him[3]. And even without his going so far as to deny it, his demeanor may fall short of constituting any such admission as will render it evidence. Thus when a magistrate brought a prisoner into the presence of his dying victim, who then made a statement to the magistrate about the crime, which the prisoner did not contradict, this statement was nevertheless held to be inadmissible[4]; for the prisoner might well have kept silent by his respect for the magistrate, and his silence therefore raised no fair inference of his assent. In the same way if a person, after having received a letter asserting that he had made a promise of marriage or accusing him of having committed a crime, should never send any reply to the letter, this inaction will be no proof that he admitted the promise or the accusation, and consequently will not enable his opponent to put in the letter as evidence against him[5]. Yet it would be different in the case of any letter—such as a mercantile one—which it would be the ordinary

[1] *Bessela* v. *Stern*, L. R. 2 C. P. D. 265.

[2] *Reg.* v. *Smith*, 18 Cox 470 (K. S. C. 509). [3] *Reg.* v. *Smith*, *supra*.

[4] *Reg.* v. *Gilligan*, 3 Crawford and Dix 175; cf. *Child* v. *Grace*, 2 C. and P. 193. But see ch. xxvi. as to its being admitted as a "Dying Declaration."

[5] *Wiedemann* v. *Walpole*, L. R. [1891] 2 Q. B. 534.

course of business to contradict at once, if the recipient dissented from the statements it contained. So the fact that, to a letter which contained a statement of accounts, no reply was sent, is some evidence of the correctness of those accounts[1]. In like manner, when papers are found in a person's possession, even though they were not written *by* but *to* him, they may be evidence against him. For his conduct in having preserved them affords some evidence that the contents of them had reached his knowledge; and also some (though weaker) evidence that he approved of them.

It must be remembered that when an admission is given in evidence against a party, he can demand that the whole statement, and not merely the inculpating part, shall be brought out[2]. And if this statement was qualified or explained by any other statement made at the same time, or if it referred expressly or impliedly to any previous statement, such statements may be incorporated with the inculpating statement[3]. But this rule as to taking the whole of an admission has no application to warrants of arrest; for they are not admissions, *i.e.*, statements of what *has been* done, but of what is directed *to be* done.

Four other exceptions arise in cases of Death.

(2) Thus, one exception is, that in questions of Pedigree, evidence is allowed to be given of statements that were made, before any dispute arose, by deceased members of the family, as to births, marriages, or deaths, (or the dates when these events occurred), or as to relationships. The deceased person must have been an actual member of the family, not a mere servant or friend[4]. And he must have made his statement before any dispute on the matter had arisen[5], as

[1] *Fairlie* v. *Denton*, 3 C. and P. 103.

[2] *Supra*, p. 349; *Randle* v. *Blackburn*, 5 Taunt. 245.

[3] *Pennell* v. *Meyer*, 2 Moo. and R. 98.

[4] *Johnson* v. *Lawson*, 2 Bing. 86.

[5] *Berkeley Peerage Case*, 4 Camp. 401; *Monckton* v. *Att.-Gen.* 2 Russ. and M. 160.

that might have tainted him with some bias. But he need not have spoken from personal knowledge of the fact he narrated; it is sufficient that he had learned it from family tradition[1].

The introduction of this exception is due to the difficulty of obtaining any first-hand evidence of events after intervals of time so long as those over which disputed genealogies often extend[2]. But its operation is not restricted to cases where this difficulty arises; for even when better testimony is available, (as where a relative, with personal knowledge, is still alive), this hearsay evidence is not excluded, or even postponed to it. It is, however, (for no very obvious reason) restricted to cases where the question upon which the evidence bears is a strictly genealogical one; so that if a defendant sets up a plea of infancy, he cannot support it by merely proving what his deceased mother said as to the date when he was born[3].

(3) A similar exception is recognised in regard to disputes as to Public Rights, which may concern all the King's subjects (*e.g.*, the existence of a highway), and even as to General Rights, which concern only some large class of people (*e.g.*, the customs of a manor, or the boundaries of a parish). For in all such cases—unlike disputes as to a private right of way or the boundaries of a private person's estate—evidence may be given as to statements that were made (whether orally or in writing), before any dispute arose[4], by deceased persons who were likely to have a competent knowledge of the subject. But such statements can only be given in evidence so far as they relate to current repute about the existence or the non-existence of this right. They cannot be adduced to shew any particular facts that would bear on the

[1] *Goodright* v. *Moss*, 2 Cowp. 591, 594.
[2] *Higham* v. *Ridgway*, 10 East 109, 120.
[3] *Figg* v. *Wedderburne*, 6 Jurist 218.
[4] *Rex* v. *Cotton*, 3 Camp. 444.

question[1], *e.g.*, the fact of the deceased person's having seen boys whipped or cakes distributed at a particular place, by some person who wished thereby to commemorate its being a parish-boundary.

(4) Declarations made by a person, now deceased, against his pecuniary or proprietary interest are admissible. Thus a declaration of a deceased person as to the terms of his tenancy of a house has been admitted as sufficient both to rebut the presumption of law[2] that the person in possession of real property holds it in fee simple, and also to establish the actual amount of rent which the deceased paid[3]. And when any such declaration is admitted, all details which form part of the same statement will be admitted, even though they were in no way against the deceased man's interests[4]. Thus the fact of a life estate having been surrendered has been proved by the entry in a deceased solicitor's ledger of his having been paid for carrying out the surrender[5]; and the date of a child's birth by a similar entry in the accoucheur's accounts of the payment of his fee for his attendance[6]. This class of evidence usually takes the form of written entries made by the deceased; but it is none the less admissible if the declaration were oral[7].

Since this principle only admits declarations against the pecuniary or proprietary interests of the deceased man, his declaration that he—and not certain suspected persons—committed a crime, would not be admissible as evidence on behalf of those persons should they be indicted for this crime[8].

[1] *Rex* v. *Bliss*, 7 A. and E. 550.
[2] *Supra*, p. 328.
[3] *Reg.* v. *Churchwardens of Birmingham*, 1 B. and S. 763 (K. S. C. 512).
[4] *Peaceable* v. *Watson*, 4 Taunt. 16.
[5] *Warren* v. *Greenville*, 2 Strange 1129 (K. S. C. 511).
[6] *Higham* v. *Ridgway*, 1 East 109.
[7] *Ibid.* [8] 11 Cl. and F. at p. 112.

(5) A similar privilege is extended to statements (whether written or oral) made by a person, now deceased, in the ordinary course of his employment[1]; even though they may be actually in favour of his own interests. Thus the fact that a man was served with a writ may be proved by the indorsement made on it by the deceased clerk who served it[2]; and the note entered by a deceased drayman, in a book kept for that purpose, of having made delivery of certain goods is evidence that those goods were so delivered[3]. But, as the mere routine of business affords a less effective guarantee for accuracy than does self-interest, this privilege is restricted by some limitations that were not imposed upon the one which we last explained. Thus a statement is not rendered admissible by having been made in the course of employment, unless it was made at the time of the occurrence to which it relates,—*i.e.*, within so few hours of it as to be practically a part of the transaction[4]. And moreover the admission of such a statement will be limited strictly to its mention of those circumstances which were essential to the performance of the duty; and will not, as in the case of a statement made against interest, cover the collateral details which may have been added[5].

(6) When in examination-in-chief a witness has said, "In consequence of what I heard or read, I *did* so and so[6]," the cross-examiner will be entitled (though the party calling the witness was not) to ask what the witness heard, or to call for the document which he read. For otherwise the witness's evidence would be left incomplete. A re-examiner may similarly supplement a cross-examination.

[1] *Reg.* v. *Buckley*, 13 Cox 293.
[2] *Poole* v. *Dicas*, 1 Bing. (N. C.) 649 (K. S. C. 514).
[3] *Price* v. *Earl of Torrington*, 1 Salk. 283 (K. S. C. 514).
[4] *Doe* v. *Turford*, 3 B. and Ad. 897.
[5] *Chambers* v. *Bernasconi*, 1 C. M. and R. 347.
[6] Or formed such or such an *opinion*.

Rule VIII. The judges of the eighteenth century went far in excluding the testimony of witnesses who seemed to them to be likely, from personal interest in the case or other causes, to give but untrustworthy evidence. A reaction, however, against this tendency was initiated by Jeremy Bentham. He pointed out that even the plainest jurymen are on the alert to suspect bias in a witness; and moreover that from every witness's evidence, whether true or false, instructive inferences may be drawn, the very fact that he thinks it worth while to lie being itself a suggestive one. The influence of Bentham has brought about legislative reforms which have removed almost all objections to the competency of witnesses on the ground of Bias[1] or of Character; it being left to the jury to take account of these considerations when deciding upon the weight to be attached to their evidence.

But (1) an adequate degree of *Understanding* is, of course, necessary in a witness; and, on the ground of want of understanding, children or insane persons may still be excluded if the judge finds, on investigation, that they are incapable of comprehending the facts about which they are to testify. But a lunatic is not necessarily incompetent to give evidence[2]. The principle is just the same as is applied in substantive criminal law[3] to the liability of infants and of lunatics. But the arbitrary rule treating children under

[1] In 1843, Lord Denman's Act made mere interest cease to be a disqualification; and in 1846 and 1851 Lord Brougham's Acts qualified even the parties to a suit to give evidence.

[2] *Reg.* v. *Hill*, 2 Den. 254. On the trial at New York, in 1901, of an attendant in a lunatic asylum for the murder of a patient, two persons of undoubted insanity were admitted as witnesses; on the authority of the decision of the Supreme Court of the United States in *Columbia* v. *Armes* (107 U. S. 419), that it is for the court, after hearing evidence as to the mental condition of the witness, to decide whether or not his insanity extends so far as to prevent "his giving a perfectly accurate and lucid statement as to what he has seen and heard."

[3] *Supra*, pp. 49, 51.

seven years of age as necessarily too young for criminal liability has no counterpart in the law of Evidence, it being now settled that competency depends not upon the precise age but upon the actual degree of intelligence of the witness[1].

(2) The value added to testimony by its being given under supernatural sanctions is frequently so great that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an *Oath*. (Increased intercourse with the East led in the seventeenth century to the recognition of Muhammadans, and in the eighteenth to that of Hindus, as satisfying this condition, and being entitled to be sworn with their own sacred ceremonies[2].) In the case of children the rule still operates[3]; (and a trial may accordingly be postponed, though not adjourned after its commencement, in order to allow time for a child to be taught the nature of an oath[4]). In the case of adult witnesses, on the other hand, it is no longer universal; for, by the Oaths Act, 1888[5], "Every person objecting to being sworn, on the ground either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation, in all places and for all purposes where an oath shall be required by law."

[1] *Rex* v. *Brasier*, 1 Leach 199.

[2] *Omichund* v. *Barker*, 1 Atk. 21.

[3] But in the case of a few exceptional offences against children, the legislature has relaxed the rule by permitting a child to give evidence without being sworn, if it "understands the duty of speaking the truth"; but such evidence requires corroboration. See for instance the Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 69); Prevention of Cruelty to Children Act, 1904 (4 Edw. 7 c. 15, s. 15). *Infra*, p. 386.

[4] *Reg.* v. *Cox*, 62 J. P. 89.

[5] 51 and 52 Vict. c. 46; replacing an Act of 1869, which was of more limited extent.

Rule IX. There are some questions which it is quite legal to ask, but which a witness may, if he think fit, equally legally refuse to answer. Such a privilege arises, for instance, in the following cases:—

(1) A witness cannot be compelled to answer any question which tends to criminate him. (For instance, even when a witness has already been tried for a murder and acquitted, he may still be in risk of criminating himself in connexion with the very same crime, *e.g.*, by admitting his having been an accessory after the fact.) He must pledge his oath that his answer would have this effect; and it will then be for the Court to decide whether the question seems to be one which, under all the circumstances of the case[1], it would really endanger the witness to answer. For a merely remote possibility of criminal prosecution[2] will not be regarded as sufficient to entitle a witness to withhold information[3].

(2) A witness cannot be compelled to produce his title deeds for inspection[4]. If however he is himself a party to the particular litigation, he does not enjoy this privilege except for deeds that are irrelevant to his opponent's case.

(3) A husband or wife cannot be compelled to disclose any communications made to him or her, during the coverture, by his or her wife or husband. This rule is based on

[1] *Fisher* v. *Ronalds*, 12 C. B. 765.

[2] *Rex* v. *Boyes*, 1 B and S. 311 (K. S. C. 585).

[3] Reference may here be made to the exceptional rule established by 24 and 25 Vict. c. 96, s. 85, for a few peculiar offences of Misappropriation, *e.g.*, by trustees, agents, etc. (*supra*, pp. 235, 236), by which a witness has no privilege against criminating himself in respect of such an offence, but he is, on the other hand, exempted from prosecution for any *such* offence if he "first disclosed" it when thus under compulsory examination. Cf. 53 and 54 Vict. c. 71, s. 27, as to compulsory admissions in bankruptcy.

[4] *Harris* v. *Hill*, 3 Str. 140; *Morris* v. *Edwards*, L. R. 15 A. C. 309.

the social importance of preserving the confidences of married life.

(4) Counsel and solicitors can not be compelled—and indeed are not even permitted—to disclose facts confided to them by[1] or on behalf[2] of a client, or to produce any documents received by them from a client, in their professional capacity, unless the client consents to waive this privilege; for it is his, and not theirs. No such protection, however, exists if the adviser was being consulted, not merely in order to protect his client against the results of a past criminal act but to facilitate the commission of some future one[3].

There is no similar privilege for confidences entrusted to a medical or even to a clerical adviser[4]; nor for business secrets (*e.g.*, secret marks upon bank-notes).

(5) By a still stricter rule, one of Exclusion rather than of Privilege, a witness cannot be compelled, and indeed will not be permitted[5], to answer any question which involves a disclosure of any official communications (whether written or oral) which are such that—in the opinion of the judge—disclosure of them would be contrary to public policy[6]. Hence in the case of prosecutions so important as to have been (not merely nominally but actually) instituted by the executive government, the name of the informer need not be disclosed by a witness, nor can he be asked if he were himself the informer[7]. But it would seem that this rule does

[1] *Rex* v. *Withers*, 2 Camp. 578 (K. S. C. 534).

[2] *Greenough* v. *Gaskell*, 1 M. and K. 101. *E.g.*, the statements made to them by a witness as to what evidence he can give. Such statements are often taken down in writing, and then signed by the witness.

[3] *Russell* v. *Jackson*, 9 Hare 392.

[4] *Wheeler* v. *Le Marchant*, L. R. 17 Ch. D. at p. 681; *Rex* v. *Gibbons*, 1 C. and P. 97 (K. S. C. 524).

[5] *Rex* v. *Hardy*, 24 St. Tr. at pp. 818, 820.

[6] *Beatson* v. *Skene*, 29 L. J. R. Ex. 430.

[7] *Att.-Gen.* v. *Briant*, 15 M. and W. 169; *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494. As to reports made to a Superintendent of Police by his constables, see 65 J. P. 209.

not extend to the case of communications made to a private prosecutor, even where the prosecution is practically in the hands of the police.

Where any of these privileges is waived by a person who is at liberty to waive it, the answer he gives will be perfectly good evidence, even against himself; both in the proceedings in which it is given and in any subsequent litigation. But if, on the other hand, he claims his privilege, and yet is illegally compelled to answer, his answer will not be evidence against him, as an admission, either then or in any subsequent litigation. Yet against other parties it is evidence, (since the privilege is only his and not theirs); and consequently, if he were not himself a party to the particular litigation, the validity of the trial will not be affected.

Rule X. Where a document is tendered as evidence the proof of genuineness necessary to secure its admission varies with its age.

(1) If the document be less than thirty years old, express evidence of its genuineness must be adduced. In ordinary cases, it is not necessary to do more than to shew that the document or the signature to it is in the handwriting of the person by whom it purports to have been executed. Handwriting may be proved by any witness who from knowing the person's handwriting can swear to the genuineness of the document; or under a modern statute[1], by letting the jury compare the document in question "with any writing proved, to the satisfaction of the judge, to be genuine," *e.g.*, a signature made by the person whilst actually in the witness-box before them[2].

[1] 17 and 18 Vict. c. 125, s. 27; extended to criminal cases by 28 and 29 Vict. c. 18, s. 8.

[2] *Cobbett* v. *Kilminster*, 4 F. and F. 490.

But there are some instruments to whose validity some further circumstance is essential; and in such cases, that circumstance must also be proved. Thus where attestation by witnesses is essential to the document[1] (as in the case of a bill of sale) it must be shewn to have been duly attested. To establish this fact one of those witnesses must, if possible, be produced: but if none of the attesting witnesses can be found[2], the handwriting of one of them must be proved, and some evidence must be given as to the identity of the person who actually executed the instrument with the person who is under discussion in the litigation, unless the attestation clause itself sufficiently identifies him[3]. Again, in the case of deeds the further ceremony of sealing is necessary (though any act by which the party adopts the seal will suffice); but where there is an attestation clause the courts will, if the signature be proved, accept this clause as sufficient evidence of sealing and delivery[4].

(2) In the case of documents more than thirty years old (just as in questions of pedigree[5]) the law of evidence is relaxed to meet the difficulties produced by the lapse of time[6]. Such documents, if produced from a proper custody, "prove themselves," *i.e.*, no express evidence of their genuineness need be adduced. Nor is it necessary that the custody from which such instruments come should be the most proper custody for them to be in; it is sufficient that the custody, though not the best, is a natural one, *i.e.*, one which, under the circumstances of the particular case, appears to the judge

[1] *Wright* v. *Doe*, 1 A. and E. 3. Cf. 7 C. and P. 574.

[2] *Crosby* v. *Percy*, 1 Taunt. 364; *Barnes* v. *Trompowsky*, 7 T. R. 265.

[3] *Whitelock* v. *Musgrove*, 1 Crom. and M. 511.

[4] *In re Sandilands*, L. R. 6 C. P. 411. Cf. 7 Taunt. 253.

[5] *Supra*, p. 370.

[6] "Time with his scythe is ever mowing down the evidences of title; wherefore the law places in his other hand an hour-glass by which he metes out periods of duration that shall supply the place of the muniments the scythe has destroyed." Lord Plunket, L.C.

to be one naturally consistent with the genuineness of the document[1]. Thus although papers relating to an episcopal see properly pass on the death of one bishop to his successor in office, yet an ancient document would be allowed to "prove itself," if it were produced from the custody of a deceased bishop's descendants[2].

[1] *Doe* v. *Phillips*, 8 Q. B. 158.
[2] *Meath* v. *Winchester*, 3 Bing. (N. C.) 183.

CHAPTER XXVI.

RULES OF EVIDENCE PECULIAR TO CRIMINAL LAW.

IN criminal cases the general principles of Evidence are supplemented by some rules and modified by others, which do not hold good in civil litigation. Of these the following deserve explanation here.

Rule I. A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature.

Even in the latter case, *e.g.*, in actions of debt, a mere scintilla of evidence would not warrant the jury in finding a verdict for the plaintiff, for there must (as we have seen[1]) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger[2], and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof[3]. The progressive increase in the difficulty of proof as the gravity of the accusations to be proved increases, is vividly illustrated in Lord Brougham's memorable words in his defence of Queen Caroline:—"The evidence before us," he said, "is inadequate even to prove a debt—impotent to

[1] *Supra*, p. 343; cf. 13 C. B., N. S., 916. [2] *Supra*, p. 326.

[3] The practical working of this is well shewn by the fact that whereas the average percentage of convictions on criminal indictments in general is about eighty, it is very much less on indictments for murder; *e.g.*, in the statistical year 1900, out of 47 persons who (besides the 16 others who were shewn to be insane) were tried for murder, only 27 were convicted of it; *i.e.*, less than fifty-eight per cent.

deprive of a civil right—ridiculous for convicting of the pettiest offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen[1]."

It was formerly considered that this higher minimum was required on account of the peculiarities of criminal procedure, such, for instance, as the impossibility of a new trial, and (in those times) the refusal to allow felons to be defended by counsel and to allow any prisoners to give evidence; and consequently that it was required only in criminal tribunals. This view is still taken in America; but in England it is now generally held that the rule is founded on the very nature of the issue, and therefore applies without distinction of tribunal. Hence, if arson be alleged as a defence by an Insurance Company when sued on a fire-policy, or forgery as a defence by a person sued on a promissory note, it cannot be established in these civil actions by any less evidence than would suffice to justify a conviction in a criminal court.

History shews how necessary is some such rule, emphatic and universal, in order to protect prisoners from the credulity which the shifting currents of prejudice will inspire about whatever offence, or class of offences, may for the moment have aroused popular indignation. No less enlightened a jurist than Bodin maintained, in an elaborate treatise[2], that persons accused of witchcraft ought to be convicted without further proof, unless they could demonstrate themselves to be innocent—"for to adhere, in a trial for witchcraft, to ordinary rules of procedure, would result in defeating the law of both God and man[3]."

[1] *Speeches*, I. 227. [2] *Démonomanie*, ed. 1598; bk. IV. ch. IV.

[3] Similarly when in 1899 Esterhazy confessed in the *Observer* newspaper that he had forged the famous "bordereau," in order that the suspicions against Capt. Dreyfus might be eked out by some item of actual evidence, he justified himself by the plea that "on the trial of Spies, it is always necessary to forge some documentary evidence [fabriquer des preuves matérielles], or no spy would ever be convicted."

Whenever, therefore, an allegation of crime is made, it is the duty of the jury—to borrow Lord Kenyon's homely phrase—"if the scales of evidence hang anything like even, to throw into them some grains of mercy[1]"; or, as it is more commonly put, to give the prisoner the benefit of any reasonable doubt. Not, be it noted, of every doubt, but only of a doubt for which reasons can be given; (for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts). "It is the condition of mind which exists when the jurors cannot say that they feel an abiding conviction, a moral certainty, of the truth of the charge. For it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty,—a certainty that convinces the understanding, satisfies the reason, and directs the judgment. But were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether[2]." As was said by Cockburn, C.J., in the *Tichborne Case*, "It must not be the mere doubt of a vacillating mind that has not the moral courage to decide upon a difficult and complicated question, and therefore takes shelter in an idle scepticism." Or as the same truth was expressed by a great Irish judge[3], "To warrant an acquittal the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice, or subdued by fear."

Accordingly, a verdict of acquittal does not necessarily mean that the jury are satisfied of the prisoner's innocence[4];

[1] *Rex* v. *Hadfield*, 27 St. Tr. 1354.

[2] *Per* Shaw, C.J., on the trial of Prof. Webster (*supra*, p. 339), 5 Cushing.

[3] Kendal Bushe, C. J., *Dublin Univ. Mag.* XVIII. 85.

[4] *Supra*, p. 343.

it states no more than that they do not regard the evidence as legally sufficient to establish his guilt. There is therefore a fallacy in the old forensic argument of prosecutors, "you must convict the prisoner unless you think my witnesses ought to be convicted of perjury"; for the jury may well be in utter doubt as to the propriety of either alternative[1].

This abstract, and therefore necessarily vague, direction, that they must be satisfied "beyond reasonable doubt," is the only restriction which, in ordinary cases, English criminal law imposes upon the discretion of juries in pronouncing upon the sufficiency of evidence. The civil and the canon law, on the other hand, required at least two witnesses[2]; and, from the frequent difficulty of obtaining these, had to fall back upon confessions extorted by torture. The English common law, by avoiding the unreasonable rule, escaped the cruel consequence[3].

The cases are rare indeed in which English law exacts any defined minimum of proof for even a criminal charge. But the following are important ones.

[1] The same grand jury ignored alike the bill for perjury preferred against Elizabeth Canning (*supra*, p. 335), and also the converse one which her friends preferred against some of the witnesses who had accused her.

[2] See Ayliffe's *Parergon*, p. 541. In some cases indeed (see Best on Evidence, p. 81) the canon law exacted far higher degrees of proof; as when it provided that no cardinal was to be convicted of unchastity unless there were at least seven—or in Fortescue's time, according to him (*De Laudibus*, c. 32, ed. Amos, p. 113), twelve—witnesses. This requirement was rendered the harder to comply with by the further rule of canon law, that in criminal cases a woman could not be a witness. The result may well have been the same as was produced by the similar rule of the Koran, requiring all accusations of adultery to be supported by four eye-witnesses, namely, that (according to Sir William Muir) "the threat of punishment became almost inoperative." For by introducing artificial rules of proof into the law of evidence it is easy to effect a modification of the substantive law, whilst appearing to modify merely the adjective law; the disguise being closely akin to that under which the Praetores Urbani succeeded in surreptitiously reforming the laws of Rome (Maine's *Ancient Law*, ch. III.).

[3] See Pollock and Maitland, II. 657.

(1) In treason and in misprision of treason, as has been provided by statute[1], a prisoner is not to be convicted except upon the evidence of two lawful witnesses, deposing either to the same overt act or at least to separate overt acts of the same kind of treason; or upon his own voluntary confession in open court. To secure the benefit of this rule, the oath by which persons were admitted, in Ireland, into the Fenian society was always administered by a single one of its members, with no third person present.

(2) Upon an indictment for perjury, (though the taking of the oath, or the giving of the perjured evidence, may be proved by one witness), the falsity of the perjured evidence cannot be legally established except by either two witnesses, or else one witness who is corroborated on some material point[2] by further evidence[3]. For each assignment of perjury such a corroboration is needed. It may be furnished by documentary evidence or a second witness or some admission by the prisoner or other similar circumstance[4].

The question as to whether a point is sufficiently material is one for the judge, not the jury, to decide. It is not necessary that the circumstance should be of such importance that from it, standing alone, the falsity of the perjured statement could have been inferred. It will not be sufficient merely to shew that the supposed perjurer has made statements directly contradictory of each other, even though both of them were

[1] 1 Edw. VI. c. 12, s. 22; modified by 7 and 8 Wm. III. c. 3, s. 2; *supra*, p. 275.

[2] There are two instances where such corroboration is, by statute, required in non-criminal proceedings; viz., in bastardy cases, and in actions for breach of promise of marriage.

[3] *Reg.* v. *Hook*, D. and B. 606 (K. S. C. 422). In some American cases, perjury has been proved without any witness, by a combination of two evidentiary documents; *e.g.*, where both a letter written by the prisoner *and* an invoice written to and preserved by him, contradicted him as to the ownership of property. Such proof would probably be held sufficient in England also.

[4] *Reg.* v. *Parker*, C. and M. 646.

made on oath[1]. For this will leave it still utterly uncertain which of the two statements was the false one; and consequently any indictment is impossible, for indictments cannot be framed in a merely alternative form.

(3) Under the Criminal Law Amendment Act, 1885[2], it is provided in regard to certain offences against women and children that no person shall be convicted of these upon the evidence of one witness alone, unless such witness be corroborated in some material particular, and by evidence which implicates the accused.

(4) Similar corroboration is required in those cases in which under the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1904[3], a child is allowed to give evidence without being sworn[4]. The precaution is wise; for a tribunal of adults is apt to place undue reliance upon these little people. "Children are a most untrustworthy class of witnesses: for, when of a tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire for notoriety[5]."

(5) Where a witness was himself an Accomplice in the very crime to which the indictment relates, it is the established duty of the judge to caution the jury strongly as to the danger of convicting upon such evidence without corroboration[6]. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with the

[1] *Rex* v. *Harris*, 5 B. and Ald. 926.
[2] 48 and 49 Vict. c. 69.
[3] 4 Edw. 7 c. 15, s. 15.
[4] *Supra*, p. 375.
[5] Mr Inderwick, K.C.; in *Side-Lights on the Stuarts*.
[6] *Reg.* v. *Stubbs*, Dearsly 555; *Reg.* v. *Boyes*, 1 B. and S. 311 (K. S. C. 535).

narrative[1]. For, as the accomplice knows the whole history of the crime, he may tell a true tale, capable of thorough corroboration, and yet may easily insert in it the name of an innocent man, in place of one of the actual offenders. Hence it is not enough that an accomplice is corroborated as to the position of the house into which the burglars broke, and as to the number of its doors and windows. And if there are two or more prisoners, and the accomplice's evidence is corroborated as regards one of them only, this will not suffice to render his evidence receivable against any of the others[2].

Corroboration by another accomplice, or even by several accomplices[3], does not suffice; nor apparently does corroboration by even the innocent wife of the accomplice[4]. But a spy, since his complicity extends only to the *actus reus* and not to the *mens rea*, is not truly an accomplice, and so does not need corroboration[5].

So soon as the prisoner raises any question as to a witness being an accomplice, the jury may be at once called upon by the judge to answer it[6], so that the prosecution may proceed, if necessary, to tender evidence to corroborate him.

But these rules as to the necessity of corroborating accomplices amount (as we have seen) only to a caution

[1] *Rex* v. *Wilkes*, 7 C. and P. 272 (K. S. C. 541). Similarly in the Divorce Court, where this sort of corroboration is always required for the evidence of private detectives, if such a detective says, "I saw respondent and co-respondent enter the hotel together, and I called this policeman's attention to it," it is no sufficient corroboration for the policeman to say merely, "He did shew me *a* man and *a* woman entering that hotel."

[2] *Reg.* v. *Jenkins*, 1 Cox 177; *Rex* v. *Wilkes*, 7 C. and P. 272 (K. S. C. 541).

[3] *Rex* v. *Noakes*, 5 C. and P. 326. "A jury is no more bound to believe two informers than one," said Whiteside, C.J.

[4] *Rex* v. *Neal*, 7 C. and P. 168; but it is not so held in the United States.

[5] *Rex* v. *Despard*, 28 St. Tr. 945; *Reg.* v. *Mullins*, 7 St. Tr. (N. S.) 1111. Yet see the dicta of Whiteside, C.J., and Keogh, J., in Chamney's *Irish State Trials of* 1867, as to the peculiar untrustworthiness of a man who has thus taken up falsehood as his trade.

[6] See C. C. C. Sess. Pap. CXL. 169; CXXXIV. 723.

and not to a command. Accordingly even in capital cases verdicts of conviction, based solely on the uncorroborated evidence of an accomplice, have upon appeal been held good[1]. And, even as a matter of mere caution, the urgency of the advice may vary according to the consistency of the witness's story, the extent of his complicity, and the heinousness of the crime. Thus the caution will be withheld altogether in cases where the charge implies so little moral guilt as not to taint a man's credibility at all; *e.g.*, in the case of non-repair of a highway[2].

Rule II. To the doctrine which excludes Hearsay evidence there are—besides the general exceptions which we mentioned along with it[3]—some further ones which are peculiar to criminal cases. Two of these deserve careful consideration.

(1) Upon an indictment for Homicide[4], the *dying declarations* of the slain man respecting the cause of his death are admitted under certain circumstances. This exception seems to have been fully recognised as early as 1697. At the Old Bailey, in that year, whilst it was held, in one trial for murder, that evidence could not be received as to the murdered man having said that he and the prisoner were going to fight a duel, yet in another, where a painter in Lincoln's Inn Fields was indicted for having killed two bailiffs, their "dying words" were admitted as evidence against him[5]. Such declarations are admitted because the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath[6]. Hence the rule has been held to be inapplicable to declarations made by a child of the

[1] *Rex* v. *Atwood*, 1 Leach 464 (K. S. C. 540).

[2] *Rex* v. *Hargrave*, 5 C. and P. 170; *Reg.* v. *Boyes*, 1 B. and S. 311 (K. S. C. 535).

[3] *Supra*, p. 367 *et seq.*

[4] *Rex* v. *Mead*, 2 B. and C. 605 (K. S. C. 519).

[5] Hargrave MSS. in British Museum, No. 146, p. 162.

[6] *Rex* v. *Woodcock*, 1 Leach 502.

age of four[1]. And, similarly, it will not apply unless the deceased thought his death quite imminent. It is not sufficient that he was "in fear of death[2]" or "thought he was going to die[3]." He must have felt nothing short of "a settled hopeless expectation of death[4]." If, however, he had thus abandoned all hope of recovery when he made the declaration, the fact that his medical attendants were not equally hopeless, or that he did actually survive for several days after making it, will not render the declaration inadmissible[5]. The present tendency, however, is to reject dying declarations except in the clearest cases, testing them with "scrupulous and almost with superstitious care[6]."

It should be carefully remembered that the rule is limited, not merely to trials for crime, but to trials for Homicide; and thus will not apply when the person who caused the death is under trial, not for it, but only for some earlier crime (perhaps an abortion or a violent robbery) of which the death was a result[7].

(2) When a witness (whether for the prosecution[8] or the defence[9]) has made a *deposition* before the justice who sent the case for trial, it may be used at the trial, instead of calling the witness himself, if he has died in the interval, or has become insane[10], or is too ill to travel, or is being kept out of the way by the prisoner[11]. But it is important to

[1] *Rex* v. *Pike*, 3 C. and P. 598; *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515).

[2] C. C. C. Sess. Pap. cxxvi. 841.

[3] *Reg.* v. *Neill*, C. C. C. Sess. Pap. cxvi. 1417 (K. S. C. 483).

[4] *Reg.* v. *Peele*, 2 F. and F. 21; *Reg.* v. *Gloster*, C. C. C. Sess. Pap. cviii. 647 (K. S. C. 518).

[5] *Rex* v. *Mosley*, 1 Moody 97.

[6] *Per* Byles, J., in *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515); cf. *Reg.* v. *Mitchell*, 17 Cox 503.

[7] *Rex* v. *Lloyd*, 4 C. and P. 233; *Reg.* v. *Hind*, Bell 258.

[8] Indictable Offences Act, 1848 (11 and 12 Vict. c. 42, s. 17).

[9] 30 and 31 Vict. c. 35, s. 3.

[10] *Reg.* v. *Marshall*, C. and M. 147.

[11] *Rex* v. *Harrison*, 12 St. Tr. 833.

notice that if the witness has merely gone abroad, it cannot be used; except in cases of misdemeanor, and even then only by consent of the opposite party.

A deposition must bear the signatures of both the witness and the committing magistrate, but it is not necessary to call any evidence to prove their genuineness. If the witness refuse or be physically unable to sign it would appear that this signature may be dispensed with[1]. When a deposition is put in as evidence, some person must be called, (very often it will be a policeman whom the committing magistrate has bound over to prosecute), who can prove that the prisoner (i) was present when the witness gave the evidence which it embodies, and (ii) had an opportunity of cross-examining him[2]. Further testimony, too, will be necessary, for the purpose of satisfying the judge that the absence of the witness is due to one of the grave causes which we have mentioned[3].

A witness's deposition will not be thus available as evidence at a trial, unless the offence for which the prisoner is being tried is (if not in technical definition, at any rate substantially), the same as that with which he was charged at that preliminary hearing where the deposition was taken[4].

Rule III. Evidence of the prisoner's *good character* is always admissible on his behalf in criminal courts; (though in civil proceedings it would be excluded, as not sufficiently relevant to the issue, and though evidence of his *bad* character is, as we have seen[5], not readily admitted even in criminal tribunals).

But, ancient and well-established as is this rule[6], opinion has been considerably divided as to its exact scope. Is the

[1] *Rex* v. *Holloway*, 65 J. P. 712.

[2] *Rex* v. *Paine*, 1 Salk. 281.

[3] *Reg.* v. *Stephenson*, L. and C. 165.

[4] *Reg.* v. *Ledbetter*, 3 C. and K. 108.

[5] *Supra*, p. 353.

[6] So much so that the fact that in some particular class of actions witnesses to the defendant's good character have always been excluded, may be used as a proof that those actions are civil and not criminal proceedings; *Att.-Gen.* v. *Radloff*, 10 Q. B. at pp. 97, 108.

"character," which the witnesses are thus allowed to describe, the disposition or the reputation of the accused person? In *Reg.* v. *Rowton*[1] the Court for Crown Cases Reserved adopted, though only by a majority, the latter alternative. Accordingly, in strictness, no evidence ought to be given about the prisoner's disposition, and still less about any particular acts of his. The witness, therefore, to borrow Erskine's words[2], is not to say "what *A*, *B*, or *C* told him about the man's character, but what is the *general* opinion concerning him. For character is the slow-spreading influence of opinion, arising from a man's deportment in society, and extending itself in one circle beyond another till it unites in one general opinion. That general opinion is allowed to be given in evidence."

But, as Lord Ellenborough long ago said, "No branch of evidence is so little attended to[3]"; and this strict rule of law is in practice constantly and humanely disregarded. For the present conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of many persons for so long a time as would enable any "general opinion" about it to grow up. No neighbour or customer of his knows anything about him except from personal experience. Yet thus to depart from the strict rule, opens out an inconveniently wide field of inquiry. For a witness's individual opinion of his neighbour's disposition may have to be supported or tested by protracted consideration of the innumerable facts which led him to form it. But evidence of a man's general reputation affords terse and summary proof of his disposition. On the other hand this briefer and more technically correct mode of proof has the disadvantage of excluding all evidence (such as perhaps might have been obtained from the very same witness who proves the good reputation) of a deep-rooted

[1] L. and C. 520 (K. S. C. 528). [2] In his speech in defence of Hardy.
[3] *Rex* v. *Jones*, 31 St. Tr. 310.

evil disposition that rendered the man utterly unworthy of the good reputation which he enjoyed.

Either method of proof, however, would admit that negative evidence which in practice is so frequent, "I never heard anything against him." Such negative testimony may be the best of all tributes to a man's disposition; for most men are little talked of until there is some fault to be found with them[1].

Evidence of good character is thus peculiar in its nature, as being a case in which the witness speaks as to other people's knowledge, instead of as to his own. And the forensic procedure in regard to it is also peculiar. For the opposite party has no right to make a speech in reply upon it; nor ought he even to cross-examine upon it, unless he knows that he can thereby elicit a definite charge against the prisoner, *e.g.*, his having committed other similar offences[2]. But evidence of good character even though obtained only by cross-examination of the Crown witnesses, may always be rebutted by evidence of his bad reputation; though not by evidence of bad disposition, still less of particular bad acts, (except that it sometimes[3] may be rebutted by evidence of previous convictions).

If a defendant does not exercise his privilege of calling evidence of his good character, the prosecution ought not to make any comment upon this omission.

The probative value of evidence to character must not be overrated. It should never be considered sufficient ground for disbelieving clear evidence of facts, for, if it were, no conviction could ever take place; since as Lord Ellenborough says, "Every criminal had a good character until he lost it." But it may be of great importance in determining which of

[1] Cf. the remarks of Cockburn, C.J., in *Reg.* v. *Rowton*, L. and C. 536 (K. S. C. 533).
[2] *Rex* v. *Hodgkiss*, 7 C. and P. 298.
[3] Under the following statutes:—7 and 8 Geo. IV. c. 28, s. 11; 6 and 7 Wm. IV. c. 111; 24 and 25 Vict. c. 96, s. 116; 24 and 25 Vict. c. 99, s. 37.

two inferences should be drawn from a fact; and consequently in all questions of *mens rea*, since they must always be matters of mere inference. It will thus be very useful in cases where a man is found in possession of recently stolen goods[1]. At a charity-bazaar at Lincoln, ten years ago, when an alarm was raised that a purse had been stolen, the thief slipped it into the coat-pocket of a bishop who was present; but any suspicions that might have been aroused by its being found in this pocket were effectually rebutted by the episcopal character of the wearer. Yet, even for such purposes, evidence of good character is, by a curious paradox, of least avail where it is most needed, namely in offences of great heinousness. For "in any case of atrocious criminality the act is so much out of the ordinary course of things, that, if perpetrated, it must have been produced by motives not frequently operating on the human mind. Therefore evidence as to the character of a man's habitual conduct in common circumstances will here become far inferior in efficacy to what it is in the case of accusations of a slighter guilt[2]." After conviction, however, evidence of character will always be of great importance in determining what punishment should be inflicted on an offender.

Rule IV. In criminal proceedings Admissions, made by (or on behalf of) a party to the litigation, are received in evidence less readily than in civil cases.

In civil tribunals, any admissions which have been made by the plaintiff, or the defendant, or the duly authorised agent of either, can be given in evidence quite freely. But in criminal cases, the admissions of the prosecutor cannot, as such, be given in evidence; for, technically speaking, he is no party at all to the proceedings, they being brought in the name of the Crown itself. And even the admissions (or—

[1] *Supra*, p. 329.
[2] *Per* Shaw, C.J., at the trial of Prof. Webster; *supra*, pp. 139, 339.

to use the term more commonly applied to admissions of criminal guilt—the Confessions[1]) made by the person accused are not allowed to be given in evidence unless it appears that they were quite voluntary. (Whether or not they were so is a question for the judge, not the jury, to decide[2].) It would seem that, even though there be no circumstances to raise any doubt as to the character of the confession, it is the duty of the prosecutor to bring evidence of its having been given voluntarily[3].

For though a litigant's own admissions may well appear at first sight to be the most satisfactory of all forms of evidence—and indeed were so regarded in the civil and the canon law[4]—experience has now shewn them to be open, especially in serious criminal charges, to two serious hazards of error[5]. For (i) eagerness to secure the punishment of a hateful offence may lead a witness to exaggerate, even unconsciously, what was said to him by the person accused; and (ii) eagerness to propitiate those who can obtain mercy for him may lead the accused person himself to make untrue admissions[6]. Hence for some two centuries past English

[1] *Supra*, p. 367. [2] *Reg.* v. *Warringham*, 2 Den. at p. 448.

[3] *Reg.* v. *Rose*, 68 L. J. R., Q. B. 289.

[4] Even so recent a civilian as Lord Stowell said:—"A confession generally ranks highest in the scale of evidence;...it is taken as indubitable truth,...a demonstration, unless indirect motives can be assigned to it"; 2 Hag. Con. 316. But now the Divorce Court will not act upon an uncorroborated confession except "with the utmost circumspection and caution" (see *Williams* v. *Williams*, L. R. 1 P. and D. 29).

[5] Hence in very grave cases English judges frequently urge a prisoner who pleads guilty to withdraw that plea. Indeed in New York the Code of Criminal Procedure forbids any conviction upon a plea of Guilty where the crime charged is punishable by death or by penal servitude for life (s. 332). Hence when Czolgosz, on his trial in 1901 for the murder of President McKinley, pleaded "Guilty," a plea of "Not Guilty" was nevertheless entered.

[6] The (now) indubitable falsity of the confessions made by many persons who suffered death for witchcraft, has done much to bring about this change in the legal estimate of the probative value of such evidence. Mr Inderwick, K.C. (*Side-Lights on the Stuarts*) cites two instances of women who thus

criminal lawyers have recognised that "hasty confessions are the weakest and most suspicious of all evidence[1]."

The rule as to what confessions are to be regarded as sufficiently voluntary may be stated thus:—a confession must be excluded if it was made (i) in consequence of (ii) any inducement (iii) that was of a temporal character and (iv) connected with this accusation, and (v) that was held out to the prisoner by a person who had some authority over the accusation. The various clauses of this definition deserve to be considered in detail.

(i) *In consequence of.* The confession will only be inadmissible if it was due to the inducement. Where therefore the inducement seems clearly to have been deprived of all influence, whether by lapse of time or by some intervening warning (*e.g.*, a magistrate's statutory caution), the confession will stand[2]. But it is never necessary that the prisoner should have been pressed to make an actual confession of guilt; it is sufficient if he were pressed to say anything whatever[3]. Thus, "It might be better for you to tell the truth and not a lie[4]," will suffice to exclude a confession; although "Speak the truth *if you speak at all,*" is harmless.

(ii) *An inducement.* It is immaterial whether the inducement consisted in a threat of evil or in a promise of good[5]. Thus the admonitions, "Tell the truth, or I'll send

confessed, although they declared privately that their confessions were false; their motive being an actual desire to be put to death, in order to escape the obloquy under which they lived; p. 164.

[1] Sir Michael Foster's *Crown Law*, p. 234. Yet in French law, great importance is still attached to them. Thus on the prosecution of the Abbé Auriol, in 1881, for the murder of two of his parishioners, when the questions of the examining magistrate failed to elicit from him any incriminating admission, the Abbé was shut up in complete isolation for thirty-seven days. On the thirty-seventh he at last made a full confession. He afterwards (though untruly) retracted it. See Mr H. B. Irving's *Studies of French Criminals*.

[2] *Rex* v. *Clewes*, 4 C. and P. 221.

[3] *Reg.* v. *Warringham*, 2 Den. 447.

[4] *Reg.* v. *Bate*, 11 Cox 686.

[5] *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96 (K. S. C. 525).

for the police[1]," and, "Tell the truth and it will be better for you[2]," are equally objectionable; and either inducement will be fatal to the admissibility of any confession which it may elicit. At one time the courts exercised a somewhat perverse (if humane) ingenuity in so construing colourless words as to detect in them some phrase which an accused person might have imagined to imply a hint of some inducement[3]. But throughout the last half century it has been held[4] that the words of any alleged inducement must be construed only in their natural and obvious meaning.

(iii) *Temporal.* An inducement will not exclude confessions produced by it, unless it were of a temporal character. To urge that it is a moral or religious duty to speak out, is not likely to cause a man to say what is untrue; and therefore will not affect the admissibility of what he says. Hence where a prisoner had been urged by the prosecutor to tell the truth "so that if you have committed a fault, you may not add to it by stating what is untrue[5]"—and similarly where the mother of one of two boys said to them, "You had better, *as good boys,* tell the truth[6]"—the confessions which ensued were received as legal evidence.

(iv) *Connected with the accusation.* If the inducement had no bearing upon the legal proceedings connected with the accusation, it will not exclude the confession. Thus a confession was admitted in spite of its having been obtained by the promise, "If you will tell where the property is, you

[1] *Rex* v. *Richards*, 5 C. and P. 318.

[2] 2 East P. C. 659.

[3] See, for instance, *Reg.* v. *Drew*, 8 C. and P. 140; *Reg.* v. *Morton*, 2 M. and R. 514.

[4] *Reg.* v. *Baldry*, 2 Den. 430.

[5] *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96 (K. S. C. 525).

[6] *Reg.* v. *Reeve*. L. R. 1 C. C. R. 362. Similarly the exhortation—"With the profession you make of being a Christian, it is only right for you to clear the innocent ones," has been held not to exclude the consequent confession; (*Reg.* v. *Peters*, C. C. C. Sess. Pap. CXXVII. 209, *coram* Channell, J.).

shall see your wife[1]." And if even an objectionable inducement to confess one crime should produce also a confession of some second and unsuspected offence, such confession will be admissible upon a trial that is only for the latter crime.

(v) *By a person in authority.* A person in authority means one who had some opportunity of influencing the course of the prosecution[2]; *e.g.*, a magistrate or a constable[3], or even a private person if he is prosecuting or is likely to prosecute. Thus if an accusation be made against a servant, and she make a confession to her master or mistress in consequence of some inducement held out by him or her, it would be excluded if the charge were one of stealing their property; whilst if it were a charge of killing her own child, they would have no such "authority" in the matter as to give any disabling effect to the inducement[4]. It is sufficient if the person in authority is present, silently acquiescing, when some third party spontaneously holds out the inducement[5].

The mere fact that it was to a constable (or other person in official authority) that a confession was made, will not cause it to be rejected, when no inducement was held out. And this will be so even if no preliminary warning had been given to the prisoner who made it; and even though he made it in answer to questions put to him by this person in authority. "To innocent people it is a most valuable safeguard to have an opportunity of knowing and answering the charge[6]." But questions thus asked are viewed jealously by

[1] *Rex* v. *Lloyd*, 6 C. and P. 693 (K. S. C. 527). There is indeed a case in which the inducement, "Tell and you shall have some gin," was held to exclude the confession, but it is a decision of very little authority; see 3 Russell on Crimes 482.

[2] *Rex* v. *Gibbons*, 1 C. and P. 97 (K. S. C. 524).

[3] A person who has the prisoner in his or her custody, though not a constable, is "in authority," *e.g.*, a "searcher" of female prisoners. *Reg.* v. *Windsor*, 4 F. and F. 361.

[4] *Reg.* v. *Moore*, 2 Den. 522.

[5] *Reg.* v. *Taylor*, 8 C. and P. 733.

[6] *Per* Lord Russell, C.J., in *Rogers* v. *Hawken*, 62 J. P. 279.

the judges; and so soon as a constable has arrested (or even charged) a prisoner, it is desirable, but not[1] essential, that he should give him a caution before asking any question.

Even, however, when English law thus regards a confession as being rendered inadmissible by some inducement, it does not exclude evidence of any *acts* that may have been performed along with, or in consequence of the giving of the confession; *e.g.*, the surrender, or the discovery, of stolen property[2]. Moreover it does not exclude confessions themselves when not obtained by an inducement, even though they may have been obtained by some underhand means; *e.g.*, by intoxicating the prisoner[3], or by abusing his confidence (as by a gaoler appropriating a letter which he had promised the prisoner to put into the post[4]), or by artifice (as by falsely asserting that some of the prisoner's accomplices are already in custody[5]). In such cases, however, the judge will doubtless warn the jury not to attach to the confession too much weight.

A further difference between civil and criminal courts, in their treatment of admissions, concerns such admissions as are made by mere agents. In civil proceedings, wherever the acts of an agent will bind the principal his admissions will also bind him, if made in the same affair and at the same time, so as to constitute a part of the transaction[6]. But

[1] See Lord Alverstone's remarks in *Rex* v. *Alexander* (*Times*, March 22, 1907). The topic of questions put to accused persons by constables, frequently though it arises in practice, is one on which there is still much uncertainty; see 12 Cox 241; 15 Cox 656; 17 Cox 628. 689; 18 Cox 374; 19 Cox 16. If the constable do not give a caution, the admission may perhaps be rendered useless; and yet, if he do give one, perhaps no admission will be uttered. See 39 Scottish Law Rep. 647.

[2] *Rex* v. *Jenkins*, R. and R. 492. [3] *Rex* v. *Spilsbury*, 7 C. and P. 187.

[4] *Rex* v. *Derrington*, 2 C. and P. 418.

[5] *Rex* v. *Burley*, 1 Phil. Ev. (7th ed.), 111.

[6] See Story on Agency, sects. 134, 451. Thus, in an action against a railway company by a passenger for the loss of his luggage, the admissions

criminal law does not adopt this wide rule[1]; it never holds a principal liable for admissions made by his agent except when he has authorised them expressly. Accordingly an admission made by a prisoner will not be evidence against his accomplices in the crime, unless it had been expressly authorised by them[2]. Yet, as we have seen, so soon as a common criminal purpose has been shewn, evidence of the *acts* of one accomplice, though done in the absence of the others, will be admissible against all of them[3].

Rule V. The principles relating to the Competency of witnesses are not identical in civil and in criminal courts.

We have already sufficiently mentioned[4] the rare and exceptional cases in which recent statutes have permitted evidence to be given in criminal proceedings by children who do not understand the nature of an oath, if they be sufficiently intelligent and be aware of the duty of speaking the truth. A much more general and more important peculiarity in the criminal rules of evidence is that by which (A) accused persons, and (B) the wives or husbands of accused persons, are entitled to refuse to give evidence; (and indeed, until very recently, were entirely incompetent to give it).

(A) The common law disqualified every person who had an interest in the result of any legal proceeding—whether civil or criminal—from giving evidence in it. Hence, of course, the actual parties to that proceeding, since they had the strongest interest of all, were disqualified; plaintiffs and

of the station-master as to the way in which the loss took place, made by him the next day after the loss, in answer to inquiries for the luggage, are good evidence against the company. *Morse* v. *C. R. Railroad*, 6 Gray 450.

[1] *Reg.* v. *Downer*, 14 Cox 486.

[2] 1 Hale 585; *Reg.* v. *Swinnerton*, C. and M. 593. So, in the Divorce Court, a respondent's confession is no evidence against her co-respondent; and an incriminating letter written by her to him, but lost in the post, will be no evidence against him, (though it would be, had he received and preserved it, *vide supra*, p. 370).

[3] *Supra*, p. 292. [4] *Supra*, p. 375.

defendants in civil cases, and prisoners in criminal ones. (But the prosecutor in a criminal case could give evidence; for technically he is no party to the proceedings, the Crown being the *dominus litis.*) Prisoners, however, until early in the eighteenth century, were usually questioned (though not upon oath) by the judge himself, at the conclusion of the Crown evidence, in order to elicit their defences[1]. And, this often was of great assistance to them; especially as no felon could then be defended by counsel. On the other hand, it gave wide scope for judicial cruelty, as was too often shewn by Lord Jeffreys and other judges in the Stuart period[2].

In civil cases the evidence of the parties was rendered admissible in 1851[3]. Subsequently in 1875 there began a series of legislative enactments which enabled prisoners to give evidence in the case of a few particular crimes. The judicial experience of the working of these exceptional privileges proved so favourable that ultimately a general enactment was passed[4]—the Criminal Evidence Act, 1898.

By it:—

1. The person charged is made a competent (but not compellable) witness for the defence at every stage of the proceedings[5]; whether he be charged solely, or jointly with

[1] See instances in the first volume of State Trials, *passim*; and *Harrison's Case* in 1692, 12 St. Tr. 159.

[2] And by Page, J., even so late as 1741. See in *Tom Jones*, bk. VIII. ch. XI., Fielding's vivid picture of Page's satirical questioning of a prisoner until "everybody fell a-laughing. It is indeed charming sport to hear trials upon life and death! But I own I thought it hard that there should be so many of them—my lord and the jury and the counsellors and the witnesses—all upon one poor man, and he too in chains. He was hanged; as, to be sure, it could be no otherwise."

[3] Lord Brougham's Act; 14 and 15 Vict. c. 99.

[4] 61 and 62 Vict. c. 36. It does not extend to Ireland; s. 7 (1).

[5] This does not however include proceedings before the Grand Jury, for they have nothing to do with the defence; *Reg.* v. *Rhodes*, L. R. [1899] 1 Q. B. 77. Nor can a prisoner, after pleading guilty or being convicted, give evidence on oath in mitigation of punishment, as there is then no

some other person. His evidence is to be given from the box and not from the dock[1].

2. (*a*) On committal for trial, he gives his evidence immediately after the magistrate has delivered the usual statutory caution as to the ultimate use that may be made against him of anything he may say.

(*b*) At trial, he gives it immediately after the Crown witnesses; unless he is going to call some witness of his own (other than a mere witness to character). When he thus does not call a witness, the fact of his having himself given evidence creates no right of reply; so that, if he be undefended by counsel the Crown counsel will have no opportunity at all of commenting upon the evidence he gives.

3. He must not be cross-examined to credit[2]; except

(*a*) as regards some offence which is such that evidence of its commission would intrinsically be admissible evidence for the prosecution (*e.g.*, as bearing upon the question of *mens rea*) in the present proceedings[3];

or (*β*) when he has put in evidence of his good character;

or (*γ*) when his defence is such as to assail the character of the prosecutor, or of the prosecutor's witnesses[4];

or (*δ*) when he has given evidence against a co-defendant[5].

"issue"; he can only, as at common law, make an unsworn statement. *Reg.* v. *Hodgkinson* (64 J. P. 808).

[1] s. 1 (*j*). [2] s. 1 (*f*). See p. 402, note 3.

[3] Thus a conviction against a schoolmaster, for an assault upon a scholar, was quashed because the defendant had been asked whether he had been previously convicted of a similar assault on another scholar; *Charnock* v. *Merchant*, L. R. [1900] 1 Q. B. 474. Had the previous assault been on the *same* scholar, the evidence would probably have been admissible.

[4] *Reg.* v. *Marshall*, 63 J. P. 36. *E.g.*, if, when under trial for a rape, he has cross-examined the prosecutrix as to her consent.

[5] *Rex* v. *Hadwen*, L. R. [1902] 1 K. B. 882. A prisoner who gives evidence is liable to be cross-examined by, or by counsel for, any person tried along with him whom he has prejudiced by his evidence. But if questions be put to him for a co-prisoner whom his evidence has not

4. The prosecutor must not comment on the fact of a prisoner's having refused to give evidence[1]. But the court is not placed (as in the United States it is) under any such restriction[2]. Experience, however, seems to shew that juries, without the help of any comment, readily draw for themselves a hostile inference from the prisoner's refusal[3].

Experience seems already to have shewn that this statute, though so great a departure from what had been a fundamental principle in English criminal procedure, has worked admirably[4]. We may add that there is also in force another statute which departs even further from the ancient principles; viz. the Evidence Act, 1877[5]. Under this, whenever criminal proceedings are taken merely to test or to enforce some *civil* right, the party charged is not only competent but even compellable to give evidence, and either for the defence or even for the prosecution.

The prisoner had at common law a right (at any rate when undefended by counsel[6]) to make a statement in his own defence without being sworn. And the Criminal Evidence Act, 1898, expressly provides[7] that "nothing in this Act shall effect any right of the person charged to make a statement without being sworn." This proviso seems intended to operate even in the case of a prisoner who does give evidence on oath; enabling him (at any rate if undefended) to add to it an argumentative unsworn statement.

prejudiced, this will give the Crown a right to a speech in reply as against that prisoner (*Reg.* v. *Paget*, 64 J. P. 281).

[1] s. 1 (*b*). [2] *Reg.* v. *Rhodes*, L. R. [1899] 1 Q. B. 77.

[3] The restrictions (for instance, as to cross-examination to credit) imposed by the Act extend even to those trials at which, by special statutes, the prisoner had already been rendered a competent witness. 19 Cox 448.

[4] See the testimony of no less competent a critic than Sir H. B. Poland, in *A Century of Law Reform*, ed. 1901, p. 54. [5] 40 and 41 Vict. c. 14.

[6] And probably even when defended; *Reg.* v. *Shimmin*, 15 Cox 122, *Rex* v. *Pope*, (*The Times*, July 8, 1902), *Rex* v. *Bernay*, (*The Times*, June 3, 1907). [7] s. 1 (*h*).

If any persons who took part with the prisoner in his crime should be indicted along with him for it, they would nevertheless, even at common law, be competent (and indeed compellable) to give evidence, either for him or for the prosecution, unless they were put up for actual *trial* along with him[1]. Accordingly, a prisoner who desired to call any co-prisoners as witnesses, would request a separate trial[2]; if he obtained it, he then could call them although their own trial had not yet taken place. Sometimes the Crown calls one of a group of prisoners, as "King's evidence"; but in that case it often secures him a formal verdict of acquittal before calling him, as this greatly enhances the effect of his evidence.

Even since the Act which rendered accused persons competent to give evidence, a prisoner will still sometimes apply thus to be tried apart from those indicted along with him. For some fellow-prisoner whom he wishes to give evidence on his behalf, may—perhaps from the dread of cross-examination—be unwilling (although now competent) to do so[3]. Or the applicant may desire this separate trial in order to avoid the danger of the jury's taking into account against himself some evidence which, legally, is only admissible against some fellow-prisoner.

(B) The common law imposed an incompetency to give evidence, not only upon the person under accusation, but also upon that person's wife or husband[4]. Thus, if several

[1] *Reg.* v. *Bradlaugh*, 15 Cox 217.

[2] In cases of felony or treason, prisoners can even *compel* a separate trial, by "severing" in their peremptory challenges (*infra*, Book IV.).

[3] Even though *A* may have been one of the witnesses who were bound over, by the magistrate who committed *B*, to give evidence for *B*'s defence, he cannot be compelled to give such evidence if he be himself indicted *and tried* along with *B*.

[4] Yet no other relationship, not even that of parent and child, was regarded as producing sufficient community of interest with a prisoner to create any incompetency. In two consecutive trials at the Central Criminal

prisoners were tried together, not only all of them but also all their spouses were thus disqualified from giving evidence; (even though each one of them was charged in an entirely separate count). The rule produced strange results. Serjeant Ballantine mentions, in his *Reminiscences*, having once prosecuted a man who obtained an acquittal by calling his mistress to prove an *alibi*, viz. his having been away at the races with her. Had he, instead, taken his wife, she could not have thus given evidence for him. On the other hand, Rush (the Norfolk murderer of 1848) was hanged on the testimony of his mistress. He had promised to marry her; and, had he kept his word, it would have saved his life.

An exceptional competency was, however, almost of necessity, conceded in those cases where the crime consisted in some act of personal violence committed by the prisoner upon the wife or husband. And, in recent years, a few statutes created further exceptions in the case of those crimes in which prisoners themselves were being rendered competent. But the whole doctrine has now been thrown into a new form by the Criminal Evidence Act, 1898[1]. The changes thus effected may be summarised as follows.

(I) In all *ordinary* criminal cases:—

1. The husband or wife of the party charged is now competent to give evidence, but only for the defence, and only on the application of the party charged[2]; (and apparently is not compellable to give evidence).

2. But this husband or wife has the full liability of an ordinary witness to be cross-examined as to credit; not merely the (very limited) liability of a prisoner who becomes a witness under this Act[3].

Court in 1889, I heard the one prisoner convicted on the evidence of his brother, and the other on that of his sister.

[1] 61 and 62 Vict. c. 36. [2] s. 1 (*a*).

[3] *Supra*, p. 401.

3. A prisoner's omission to call the husband or wife is not to be commented upon by the prosecution[1].

4. To call the husband or wife has the same effect as calling any ordinary witness for the defence, in giving the Crown the right of reply.

(II) Moreover in the following *exceptional* cases, the husband or wife of the party charged is a competent witness for either the defence or even the prosecution, and quite irrespectively of the consent of the party charged[2].

1. Cases where the common law itself recognised an exception to the general rule[3]; viz. upon charges of personal violence committed against the husband or wife in question[4]. This would cover an assault or an attempt to murder; but not crimes that involve no actual violence, such as bigamy or libel.

2. Cases where, under the Married Women's Property Act, 1882[5], the husband or wife is taking criminal proceedings for an offence committed against his or her property by the prisoner.

3. Cases of the sexual offences dealt with by sections 48—55 of the Offences against the Person Act, 1861[6], or by the Criminal Law Amendment Act, 1885[7].

4. Cases under the Prevention of Cruelty to Children Act, 1904[8]. But not to be a *compellable* witness.

5. Cases where a man is charged under the Vagrancy Act[9] with neglecting to maintain (or with deserting) his wife or any of his family.

6. Cases where criminal proceedings are taken to test or to enforce a *civil* right[10].

[1] s. 1 (*b*). [2] s. 4. [3] *Supra*, p. 404. [4] s. 4 (1).
[5] 45 and 46 Vict. c. 75, ss. 12, 16. *Supra*, p. 184.
[6] 24 and 25 Vict. c. 100, s. 2. [7] 48 and 49 Vict. c. 69.
[8] 4 Edw. VII. c. 15. [9] 5 Geo. IV. c. 83. *Supra*, pp. 321, 322.
[10] Evidence Act, 1877, s. 6 (1); *supra*, p. 402.

In nos. 2 and 6 the husband or wife was, even before the Act of 1898, already *compellable* to give evidence; and apparently also in no. 1. In no. 3, however, the statute of 1885 prohibited such compulsion. Yet the Act of 1898 is usually regarded (see the *Law Journal* newspaper, XXXIV. 646) as having impliedly repealed this prohibition; and thus as permitting compulsion in no. 3, and *a fortiori* in no. 5. But in no. 4, the Act of 1904 makes compulsion impossible.

These six exceptions depend on the Act of 1898; but there are also other though less important ones (see Wm. Wills on *Evidence*, p. 406).

Rule VI. Documents which require to be stamped are treated differently in civil and in criminal courts.

For purposes of revenue an artificial restriction upon the admissibility of documents as evidence has been created by the imposition of Stamp Duties upon certain classes of them. Familiar instances are the penny stamp upon receipts for the amount of £2 or over; the sixpenny stamp upon a written agreement whose subject is of the value of £5; and the *ad valorem* stamp of 10*s.* per £100 on conveyances, and of 2*s.* 6*d.* per £100 on mortgages and bonds. Under the earlier Stamp Acts, a document that ought to bear a stamp, and yet bore none, was incapable of being used as evidence in any court whatever, whether civil or criminal. Hence on the trial of a man for having burned down his shop, with intent to defraud the Insurance Company of the sum for which he had insured it, it was held that the absence of any stamp on the policy of insurance rendered it inadmissible in evidence, even though it was tendered for the mere purpose of proving the particular intent alleged in the indictment[1].

Hence such duties formed a conspicuous example of taxes on Litigation; which Bentham condemned as "the worst of all taxes, being denials of justice, co-operating with every injury and with every crime, and directly violating that first

[1] *Rex* v. *Gilson*, 2 Leach 1007; R. and R. 138.

of statutes, Magna Charta—'Justice shall be sold to no man[1].'" But the severity of their operation was greatly mitigated in 1854, when an enactment (now superseded by the Stamp Act, 1891[2]) established with respect to them an important difference between civil and criminal courts. For whilst in civil proceedings unstamped documents are still incapable of being given in evidence, without at least the payment of penalties[3], the absence of a stamp no longer prevents any document from being given in evidence in criminal proceedings.

Rule VII. The testimony of witnesses who are abroad can be made available much more easily in civil than in criminal courts.

The fundamental principle which, as we have seen, excludes hearsay evidence rendered it impossible for such persons to give their testimony by merely sending letters or affidavits, without coming to England to appear in court in person. Even an official telegram from the Madras Government in answer to an inquiry addressed to it by the India Office cannot be given in evidence[4]. But in civil courts this difficulty has now been overcome by making a general provision for taking the evidence of such witnesses upon oath, with full formalities, in the foreign country where they reside[5]; by granting a commission or appointing a special examiner.

But in criminal courts no such general rule prevails[6]. In some exceptional instances, however, statutes have sanctioned the taking of evidence abroad for use in criminal cases.

[1] *Works*, IV. 582. [2] 54 and 55 Vict. c. 39, s. 14 (4).

[3] And some instruments (*e.g.*, bills of exchange and bills of lading) can only be stamped at the time of execution; so that, if not stamped then, they cannot be rendered admissible as evidence even by payment of penalty.

[4] *Reg.* v. *O'Flynn*, C. C. C. Sess. Pap. cxx. at p. 916.

[5] *Rules of the Supreme Court*, Order XXXVII. rule 5.

[6] Accordingly in the Tichborne proceedings, the witnesses from Chili, whose evidence had been taken in that country for the civil action, had to come to England to give evidence in person at the criminal trial.

The most important of these provisions is one, contained in the Merchant Shipping Act, 1894[1], which provides for all cases in which an accused person is himself in the foreign country where the witness is; (as may well happen if the crime be committed at sea, or abroad). For it permits any deposition on oath made outside the United Kingdom before a proper official—a magistrate if in a British possession, or a British consular officer if in a foreign country—*in the presence of the accused* to be given in evidence in any criminal proceedings here to whose subject-matter it relates, if, at the time of using it, the witness is not in the United Kingdom[2].

[1] 57 and 58 Vict. c. 60, s. 691.

[2] The other statutes are of a less general character. By 13 Geo. III. c. 63, on a prosecution in the King's Bench Division for an offence committed in *India* (*infra*, p. 421), the court may issue a mandamus to Indian courts to take evidence publicly in court; a provision which is extended by 6 and 7 Vict. c. 98, to any offence against the Slave Trade Acts committed outside the United Kingdom, but within the *Empire*. In extradition proceedings, the Extradition Act, 1870 (33 and 34 Vict. c. 52) allows written depositions taken abroad to be given in evidence.

BOOK IV.

CRIMINAL PROCEDURE.

CHAPTER XXVII.

LIMITATIONS ON CRIMINAL JURISDICTION.

We have now explained the Substantive law of crime; and also that portion of the Adjective law which regulates the evidence by which crimes are to be proved. We have, finally, to consider the remaining portion of adjective law; that which regulates the procedure by which offenders who have committed crime are brought to punishment. We may begin by mentioning some limitations upon the exercise of this procedure; and then go on to describe the various courts in which it is exercised.

Limitation by Time.

To civil actions, lapse of time may often operate as a bar; *Vigilantibus, non dormientibus, jura subveniunt.* But it can rarely affect a criminal prosecution. For the King could do no wrong[1]; and consequently it was impossible that his delay in pressing his claims, whether civil or criminal, could be due to any blameable negligence. Accordingly at common law it was a rule that those claims remained unaffected by lapse of time; *nullum tempus occurrit regi*[2]. And though,

[1] *Supra*, p. 77. [2] 2 Coke Inst. 273.

as regards civil claims, this kingly privilege has now been subjected to grave limitations by 9 Geo. II. c. 16, it still operates almost unimpaired in criminal prosecutions. Hence in several noteworthy cases, offenders have been brought to justice many years after the commission of their crimes. Thus the trial of Eugene Aram took place fourteen years, that of Governor Wall[1] nineteen years, that of Edward Shippey[2] thirty years, and that of William Horne[3] thirty-five years after the respective murders for which they were executed. Stephen[4], indeed, mentions a prosecution in 1863 for the theft of a leaf from a parish register no less than sixty years previously.

But this rule, that lapse of time is no bar to criminal justice, is subject to a few statutory exceptions. Of these the following are the chief[5]:

i. A prosecution for treason or misprision of treason must be brought within three years from the commission of the crime; unless the treason either consists of an actual plot to assassinate the Sovereign, or was committed abroad[6].

ii. Offenders against the Riot Act[7] must be prosecuted within one year.

iii. The misdemeanor of carnally knowing (or attempting to know) a girl between the ages of thirteen and sixteen must be prosecuted for within six months[8].

iv. All the innumerable offences which are punishable on summary conviction must be prosecuted for within six months[9].

[1] 28 St. Tr. 51; *supra*, p. 127. [2] 12 Cox 161; A.D. 1871.
[3] *Annual Register*, II. 368; *Gentleman's Magazine* for 1759, pp. 604, 627.
[4] *Hist. Cr. Law*, II. 2.
[5] Others are mentioned in Stephen, *Hist. Cr. Law*, II. 2.
[6] 7 and 8 Wm. III. c. 3, ss. 5, 6. *Supra*, p. 275.
[7] 1 Geo. I. st. 2, c. 5; *supra*, p. 284.
[8] 48 and 49 Vict. c. 69, s. 5 (i); 4 Edw. VII. c. 15.
[9] 11 and 12 Vict. c. 43, s. 11.

Limitation by Territory.

According to International Law, a State ought only to exercise jurisdiction over such persons and property as are within its territory. And in criminal matters it cannot always exercise jurisdiction over an offender even though he actually be within its territory. For it is forbidden by International Law to try foreigners for any offences which they committed outside its territorial jurisdiction[1]. One unique exception is, indeed, allowed. For persons guilty of any act of "Piracy *jure gentium*[2]" are treated as the common enemies of all mankind, and any nation that can arrest them may exercise jurisdiction over them, whatsoever their nationality, and wheresoever their crime may have been committed, even though it were within the territorial waters of some other nation[3].

Hence the activity of a nation's criminal courts is usually confined to those persons[4] who have committed offences on its own soil or on one of its own ships[5]. Accordingly, persons who come into a State's territory, after having committed a crime elsewhere, usually incur no risk of being punished by the courts of their new home for what they did in their old one. In modern times, however, in order to counteract this immunity, almost all civilised countries have concluded Extradition treaties; mutual arrangements whereby any person who betakes himself abroad after he has perpetrated a serious offence may be arrested, and then sent back to

[1] Dr T. J. Lawrence's *Principles of International Law*, § 125, p. 219.

[2] *Supra*, p. 315; Lawrence, § 122, p. 209.

[3] *The Marianna Flora*, 11 Wheaton at p. 41; *In re Tivnan*, 5 B. and S. at p. 677. But this would not cover acts which, like trading in slaves, are made piracy by local laws alone. For one country—or even several countries—cannot add to International Law.

[4] But it covers such persons even though they be aliens; *Courteen's Case*, Hobart 270; *Ex parte Barronett*, 1 E. and B. 1.

[5] As to "territorial waters," see 41 and 42 Vict. c. 73.

take his trial in the country where this offence was committed[1], if it were not a "political" crime.

Extradition transmits an offender from the territory of one nation to that of another. But even within a nation's own territory, if her constitution be a federated or quasi-federated one, some similar provision may be necessary, in order to transmit offenders from one of the component local jurisdictions to another. Thus within the British Empire, the Fugitive Offenders Act, 1881[2], provides for a surrender, akin to an extradition by a foreign nation, where a person who had committed an offence in one part of the King's dominions[3] has fled to another part of them. The range of crimes for which such a person may be thus surrendered is naturally much wider than in the case of extradition to a foreign country. It comprises all offences that are punishable (in the territory where they are committed) with not less than twelve months' imprisonment with hard labour. The statute moreover applies even though the conduct with which the fugitive is charged would have constituted no offence at all if committed in that part of the King's dominions to which he has fled.

International Law, although forbidding States to exercise criminal jurisdiction over any foreigner for an offence committed by him outside their territorial jurisdiction, nevertheless leaves unlimited their power to punish their own subjects. Yet nations vary in their readiness to exercise

[1] Lawrence, pp. 233—240; Hall's *International Law*, pp. 60, 206—9.

[2] 44 and 45 Vict. c. 69.

[3] In consequence of the annexation of the Transvaal, the question has recently been raised whether this Act applies only when the territory in which the offence was committed formed part of the King's dominions at the date of the offence, or will apply even though the territory did not become incorporated into those dominions until after the crime. Contradictory decisions on this point have been given recently in South Africa; the Supreme Court of Natal deciding for the power of surrender (*Wooly* v. *Rex*, May 28, 1901), but that of Cape Colony deciding against it (*Cohen* v. *Reg.* Jan. 17, 1901).

this power in respect of crimes which their subjects have committed whilst away from their native soil. Great Britain (like France and the United States) prefers, in nearly all cases, to adhere to the principle that crimes are local matters, to be dealt with where they are committed. But to this general rule she has by modern statutes made a few exceptions; empowering her courts to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil[1].

Doubt has arisen as to whether, even when a man is in England, he would commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad[2]. For as English courts have no official knowledge of foreign law they cannot be sure that the act, however wicked, is actually a crime by the law of the particular foreign country concerned. (Hence if goods stolen abroad were brought to this country by a man who had knowingly received them abroad, though persons who knowingly received them from him here could not be extradited for punishment abroad, as he clearly could be, it nevertheless was doubtful whether they

[1] This is the case with, as we have seen, homicide (24 and 25 Vict. c. 100, s. 9, *supra*, p. 141) and bigamy (*ibid.* s. 57, *supra*, p. 302); and piracy (*supra*, pp. 316, 411). So is it with treason and misprision of treason (35 Hen. VIII. c. 2, s. 1); with offences committed by colonial governors (11 Wm. III. c. 12; see *Reg.* v. *Governor Eyre*, L. R. 3 Q.B. 487); with (*supra*, p. 318 *n*) un-neutral foreign enlistment (33 and 34 Vict. c. 90, s. 4); offences against the Official Secrets Act, 1889 (52 and 53 Vict. c. 52, s. 6); and with some offences against the Explosives Act, 1883 (46 and 47 Vict. c. 3). And by the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60, s. 687), with *any* offence committed by British subjects who are, or have within three months been, seamen on a British ship.

[2] This doubt was debated with much political ardour in 1858; in consequence of various persons having conspired in London to assist Orsini in his project of assassinating Napoleon III. in Paris. Orsini's attempt was made on January 14th, 1858, the Emperor escaping unhurt; but ten of the spectators being killed, and a hundred and fifty-six wounded.

could even be punished here[1].) The general principle still remains unsettled, but particular cases have been dealt with by statute. Conspiracy (or incitement) here to commit a *murder* abroad has been made indictable[2]. And the offence of dealing in this country with goods stolen abroad has been dealt with by the Larceny Act, 1896[3]; which provides that it shall be an offence, punishable with seven years' penal servitude, to receive, or to have[4] in possession, in this country without lawful excuse, any property stolen outside the United Kingdom, knowing such property to have been stolen. Property is to be deemed to be "stolen" whenever it has been obtained under such circumstances that if the act had been committed in the United Kingdom it would have constituted an indictable offence, even though not a larceny. The Act applies not only to cases of receiving in England goods stolen abroad by other persons, but even to cases where the thief himself is found in possession of the goods in England[5].

A person, although himself abroad, may by the hands of an innocent agent commit a crime in England; *e.g.*, by posting in France a libellous letter which the postman will deliver for him in London. If the Frenchman come to England, he may be tried here[6].

[1] Cf. C. C. C. Sess. Pap. LXXXIV. 295; LXXXVIII. 688.

[2] 24 and 25 Vict. c. 100, s. 4; *Reg.* v. *Most*, L. R. 7 Q. B. D. 244.

[3] 59 and 60 Vict. c. 52.

[4] Thus covering cases in which not only the act of stealing, but even that of receiving, took place abroad.

[5] *Rex* v. *Graham*, 65 J. P. 248.

[6] *Rex* v. *De Marny*, L. R. [1907] 1 K. B. 388.

CHAPTER XXVIII.

CRIMINAL COURTS.

We may now proceed to describe the various courts that possess a general criminal jurisdiction; considering them in the order of their dignity.

I. *The High Court of the King in Parliament.*

This is the highest court in the realm. Its title must not mislead the student into supposing either that the King sits there in person, or that the word "Parliament" is used in the usual modern sense, as including the House of Commons[1]. But a Parliament, when deprived of the Sovereign and of the Commons, becomes simply the House of Lords; by which, accordingly, the jurisdiction of this court is exercised. That jurisdiction is twofold: (A) as a Court of Appeal, and (B) as a Court of First Instance.

(A) In civil matters the House of Lords is the only final court of appeal on all questions of law from English secular tribunals. But in criminal causes it is only one, and far the less active, of two such courts. Until 1907 its functions of appeal were limited to those extremely rare errors of law which are apparent on the record itself[2]. Such an error would appear in any indictment that disclosed no

[1] Anson (*Law and Custom of the Constitution*, pt. I. p. 348) shews how the Commons have ceased to share in the judicial functions of Parliament.

[2] Chitty says that the record contains (*inter alia*) the judge's commission, the indictment by the Grand Jury, the arraignment, plea, issue, award of jury, verdict, judgment; (*Practical Treatise on Criminal Law*, I. 720). But it never shews the evidence, or the rulings of the judge as to admission or rejection of evidence, or his statements in his summing up to the jury.

crime. But the Act of 1907[1] which created the new Court of Criminal Appeal provides[2] that from it there may be an appeal to the House of Lords on any point of law which the Attorney-General certifies to be of such exceptional *public* importance that it is desirable to have the highest decision on it. A sitting of "Parliament" for legal appeals differs very gravely from an ordinary sitting of the House of Lords. For, by the Appellate Jurisdiction Act, 1876, there must be present at least three "Lords of Appeal[3]"; and, on the other hand, by a rule of constitutional etiquette which has prevailed since *O'Connell's Case* in 1844[4], all peers who are not lawyers abstain from being present. Moreover, under the Act of 1876, the Lords of Appeal may be authorised by the House of Lords to hold these sittings after the prorogation of Parliament; and the Crown may authorise them to sit even after Parliament has been dissolved.

(B) The House of Lords is also a court of first instance. In this capacity, unlike that already mentioned, it can try questions of fact as well as of law; and the modern rule of etiquette excluding non-legal peers has therefore no application here. But as the early Chancellors, being ecclesiastics, could take no part in capital trials, it became the practice for the Crown to appoint some peer (it will now probably be the Lord Chancellor himself) as Lord High Steward, to preside. Criminal cases may deserve to be tried before this august tribunal, on account of the dignity of either (1) the accused or (2) the accusers.

(1) Peers when accused of treason, or felony, or the misprision of either, must be tried by their noble peers[5]. This

[1] 7 Edw. 7. c. 23. *Infra*, p. 490. [2] s. 1 (6).

[3] 39 and 40 Vict. c. 59. These may be either Lords of Appeal "in Ordinary" (*i.e.*, salaried life peers appointed by virtue of the Appellate Jurisdiction Act, 1876), or peers of the realm who have held high judicial office. [4] Knight's *Popular History of England*, VIII. 520.

[5] Pollock and Maitland, I. 393. 1 Bl. Comm. 401.

privilege depends upon nobility of blood, not upon the right to a seat in the House of Lords; and accordingly is possessed even by peeresses, infant peers, and non-representative Scotch or Irish peers. The weight of authority is decidedly in favour of the view that a peer cannot waive the privilege[1]; (cumbrous and inconvenient though the form of procedure is[2], as was vividly shewn by the recent trial of Earl Russell[3] for bigamy). All prosecutions of peers are, however, commenced in one of the ordinary courts, by an indictment found by an ordinary grand jury; this indictment being subsequently removed into the House of Lords (or into the Lord High Steward's Court) by a writ of *certiorari*.

It appears that bishops cannot be tried by the House of Lords. No bishop has ever been so tried; and Archbishop Cranmer and Bishop Fisher were tried by ordinary juries[4]. Bishops may however sit at the trial of a secular peer, until the final moment when the lords come to the vote of "guilty," or "not guilty[5]." This disqualification for pronouncing judgment doubtless arose from the rule of canon law which forbade clerks to take part in any sentence of death; though it also has been explained by the questionable doctrine of "ennobled blood[6]."

(2) Any person, whether peer or commoner, who is impeached by the House of Commons must be tried by the House of Lords. A peer may be thus impeached for any

[1] See in Hansard, cccx. 245 (Jan. 31, 1887), the debate as to the indictment of Lord Graves.

[2] It will be found vividly described in *Blackwood's Magazine*, Dec. 1850, in an account of the trial of Lord Cardigan in 1841, for firing at Capt. Tuckett in a duel; the latest instance before *Earl Russell's Case*.

[3] L. R. [1901] A. C. 446.

[4] Yet the Resolution of the House of Lords excluding bishops from trial by the peers (Lords S.O., No. 61), depends upon the doctrine of "ennobled blood"; which Dr Stubbs regards as historically a mere absurdity.

[5] *Earl of Danby's Case*, A.D. 1679, 13 *Lords' Journals*, 571.

[6] Anson on the Constitution, I. 341.

crime; and so may a commoner for, at any rate, any high misdemeanor[1]. But as the House of Commons is itself now able to exercise directly an effective political control over the proceedings of the great officers of state, the cumbrous procedure by impeachment has fallen into utter disuse. Its inconveniences were vividly manifested in the proceedings against Warren Hastings; which lasted from 1786 until 1795. Since Lord Melville's impeachment in 1805[2] there has been no instance of it; and none is likely to arise. For impeachment, as Lord Macaulay says, "is a fine ceremony, which may have been useful in the seventeenth century, but not one from which much good can be expected now[3]."

II. *The Court of the Lord High Steward of the United Kingdom.*

This court differs in name, rather than in substance, from the tribunal first mentioned. It sits for the purpose of trying peers for treason, or felony, or misprision of either, when the recess or the dissolution of Parliament makes it impossible to have recourse to the House of Lords in its technical form. The court consists of such temporal peers as the Lord High Steward[4] may summon. But they must not be fewer than

[1] On the controversy whether a commoner can also be impeached for felony and for treason, or may for these crimes insist on being tried by "his peers" according to Magna Charta, the student is referred to the conflicting precedents collected by Serjeant Stephen in his edition of Blackstone (Bk. VI. ch. 14), and by Sir Erskine May (*Parliamentary Practice*, pp. 734, 736). The latter eminent authority considers impeachment applicable even to these graver crimes; in opposition to the conclusions of Blackstone (IV. 256), and Lord Campbell (*Lives of the Chancellors*, III. 358).

[2] 29 St. Tr. 549. It was described by a lawyer as "not an impeachment of waste, but a waste of impeachment."

[3] Essay on *Warren Hastings*. For an account of the process of impeachment, see Anson on the Constitution, I. 338.

[4] At one time there was an hereditary Lord High Steward, but for some centuries past, the office has been granted only for the occasion of a particular trial. As to the institution of his court, in the fifteenth century, see a recent brilliant volume, *His Grace the Steward*, by Mr L. W. Vernon Harcourt.

twenty-three; since the court decides by a majority, and there cannot be a valid vote of guilty or not guilty unless twelve concur in it. On trials for treason or misprision of treason, it is provided by 7 Wm. III. c. 3 that all the peers who have seats in the House of Lords must be summoned. To this court, unlike the High Court of Parliament, no bishop can even be summoned; and hence there is no doubt that a bishop cannot be tried by this court. Again,—though in trials by the High Court of Parliament all the members are equally judges of law as well as fact—in this court there is a division of functions akin to that between a judge and a jury. For the Lord High Steward is the sole judge on questions of law, but cannot vote on facts; and the facts are determined by the rest of the court, (who are called "the lords triors").

III. *The Court of Criminal Appeal.*

Except for those rare errors of law which are actually (in technical phrase) "apparent on the record," the common law provided no court of appeal in criminal cases, although it made abundant provision for civil appeals. Hence the judges had recourse to the wise practice of holding informal meetings to discuss questions of difficulty which had arisen before any of them at criminal trials. By 11 and 12 Vict. c. 78 these informal meetings were superseded by the establishment of a formal tribunal—the "Court for Crown Cases Reserved"—with power to determine points of law which arose upon the trial of any prisoner at either the Assizes or the Quarter Sessions. By the Judicature Acts, this jurisdiction was transferred to the High Court of Justice, *i.e.* the lower section of the Supreme Court of Judicature. Such appeals could be made by the prisoner only, not by the Crown. But he could not make them as of right; for he could not compel the judge to reserve a point. And only

questions of law could be reserved, never questions of fact. The annual number of such appeals only averaged eight.

A more comprehensive principle has now been established by the Criminal Appeal Act, 1907, which created a general "Court of Criminal Appeal[1]," that can review any question whether of law or of fact. This Court is to consist of the Lord Chief Justice of England along with eight judges of the King's Bench Division of the High Court selected by him and approved by the Lord Chancellor. It may sit in two divisions; but every sitting requires a quorum of at least three judges. To render impossible an equal balance of opinion, it is enacted that the number of judges present must always be an uneven one. And, further to secure certainty in the law, only a single judgment—as in the Judicial Committee—is usually to be delivered.

This Act of 1907 abolished (s. 20) a rare form of appeal—not occurring once in a decade—the Writ of Error. By this, a decision of the King's Bench Division upon a point of law that was "apparent on the record" of a criminal case might be brought before His Majesty's Court of Appeal, (*i.e.* the upper section of the Supreme Court of Judicature), though that Court was debarred, by s. 47 of the Judicature Act, from receiving any other form of appeal in *criminal* matters. Thence the case might be carried up to the House of Lords, (or, to express it more technically, to "His Majesty the King in his Court of Parliament").

Thus, since 1907, both His Majesty's Court of Appeal[2] and (in its *collective* form) the High Court of Justice have ceased to exercise any jurisdiction as courts of criminal law.

[1] For a full account of its working, see p. 490 *infra*.

[2] But in the merely *quasi*-criminal offences of obstructing (or not repairing) a highway or bridge or river, the Act of 1907 confers—s. 20 (3)—on the convicted offender the same full rights of appeal as if he were a defendant in a civil action at assizes; apparently including the right of resort to His Majesty's Court of Appeal.

IV. *The King's Bench Division of the High Court of Justice.*

This tribunal exercises the criminal jurisdiction of the ancient *Curia Regis*[1]. Hence, though the Lord Chancellor is the highest of the judicial functionaries of the realm, not he but the Lord Chief Justice (who presides in this Division) is the head of our criminal judicature. And from it alone is it now usual to select the judges of assize; to the exclusion of their colleagues in the other Divisions of the High Court.

Like the House of Lords, the King's Bench Division has cognizance both of matters of first instance and of matters of appeal.

(A) As a court of first instance, the King's Bench Division possesses (though in modern times it is scarcely once a year that it exercises) an original jurisdiction in four classes of offences. For it can try the following ones:—

(1) Any crime committed out of England by one of our public officials in the execution of his office[2].

(2) Any misdemeanor, in whatever part of England committed, for which an "information[3]" (dispensing with all recourse to a grand jury) has been filed by some officer of the Crown.

(3) Any indictable crime (whether a misdemeanor or even a felony or treason) that has been committed in Middlesex.

(4) Any indictable crime, in whatever part of England committed, an indictment for which has been found in some other court (*e.g.*, at the Assizes) and has since been removed by *certiorari* into the King's Bench Division for trial. The

[1] Anson, *Law and Custom of the Constitution*, ch. x. sect. I. § 1.

[2] For crimes by governors of colonies such trial was authorised so far back as 11 Wm. III. c. 12; and 42 Geo. III. c. 85 made it applicable to all officials abroad.

[3] *Infra*, p. 453.

object of such a removal may be either to secure a "trial at bar," or to enable the case to be tried with some of the incidents of civil procedure.

A trial at the bar of the King's Bench Division takes place before (at least) three of its judges with a special jury[1]. From such a trial no appeal lay to the Court for Crown Cases Reserved. But cases that have been removed into the King's Bench Division for trial are usually tried not at bar but before a single judge of that Division, either in London (in which case if the charge be one of felony the trial usually takes place at the Central Criminal Court), or else at some circuit, but on its civil side (the King's Bench Division having no power over the criminal side of an assize court). The costliness of this procedure makes it impossible except in the case of wealthy persons. The crimes for which it is oftenest asked for are libel, assault, conspiracy, perjury, and nuisance. In such proceedings, unlike ordinary criminal ones, if the charge is one of misdemeanor, a special jury may be obtained at the wish of either the prosecutor or the defendant; and formerly, until the Criminal Appeal Act, 1907, (s. 20), the defendant enjoyed also the unique privilege of being able to obtain a new trial, if he were wrongly convicted.

(B) In its appellate functions the King's Bench Division is much more active. They are usually exercised through two (or three) of its judges sitting as a Divisional Court. The appeals are of two kinds.

(1) By a writ of *Certiorari* the proceedings of Quarter Sessions or of any still lower court may be brought before it to be reviewed and (if necessary) quashed for error of law. No such course can be taken with the proceedings of the Assizes or the Central Criminal Court.

(2) By a Case being stated by justices of the peace

[1] The latest cases are those of the leaders of the Jameson Raid, see L. R. [1896] 2 Q. B. 425; and of Lynch, L. R. [1903] 1 K. B. 444.

at petty sessions[1], (at the instance of either prosecutor or defendant), any question of law that has arisen before them may be brought to the King's Bench Division for determination.

Formerly, too, a Writ of Error might bring up before it any question of law apparent on the record of proceedings in which judgment had been given by any court of record; (*e.g.*, at the Assizes, or the Central Criminal Court, or the Quarter Sessions). But writs of error, which had long been very rare[2], were abolished in 1907 by the Criminal Appeal Act of that year, (s. 20).

V. *The Assize Courts.*

These ancient itinerant criminal tribunals[3] are created by two commissions issued two, three, or four times[4] a year, (according to the county), to judges of the High Court and some eminent members of the bar, authorising them to try the prisoners presented for trial by the grand juries of the several counties for which the Assize is to be held. One criminal commission is that of Oyer and Terminer ("to hear and to determine"), giving authority to try all prisoners against whom true bills have been found at that particular Assize. The other is that of General Gaol Delivery, giving authority to try all prisoners who are in gaol or have been released on bail; whatever may have been the Assize at which the bills against them were found. There is, in practice, little difference between the lists of prisoners triable under the two commissions; and the two lists of commissioners are identical. The courts thus held can try any

[1] Courts of Quarter Sessions also may state a case for the consideration of the King's Bench Division, but only in regard to some matter that has come to them on appeal from petty sessions.

[2] In 1894 the first writ of error since 1875 was argued; *Reg.* v. *Taylor*, L. R. [1895] 1 Q. B. 25.

[3] See Stephen, *Hist. Cr. Law*, I. 75—144. [4] See p. 515 *infra*.

indictable offence whatever, and are the most important of our criminal courts of first instance; but they have no appellate jurisdiction.

In London and its suburbs the function of the Assizes is discharged by the Central Criminal Court—a special tribunal created by 4 and 5 Wm. IV. c. 36; the Commissions of Oyer and Terminer and of General Gaol Delivery for the metropolitan district being addressed to the Lord Mayor and Aldermen of the City of London, along with all the judges of the High Court, the Recorder, the Common Serjeant, and others. The sittings under these commissions are held monthly; and sometimes proceed in as many as four courts simultaneously, one or another legal member of the commission presiding in each of these.

VI. *General Quarter Sessions.*

These, in their oldest form, are meetings of the justices of the peace of a particular county; and two at least of such justices must be present. They are held once a quarter, or, by adjournment, oftener[1]. More recently, 108 cities and boroughs have also obtained the privilege of a local Court of Quarter Sessions; presided over, however, not by justices of the peace, but by a Recorder, who is the sole judge. He must be a barrister of at least five years' standing[2]. Every

[1] In the County of London, the volume of business is such that they are held much oftener. Thus those for *North* London (which try one-seventh of all the persons indicted in England and Wales) are held twice a month.

[2] In the Quarter Sessions of counties (except two or three populous ones possessing salaried Chairmen) there is no such guarantee for the accurate administration of justice. It is a singular paradox that our constitution should permit trials (not merely for petty matters of police but) for charges that seriously affect men's character and liberty to be conducted by persons who, however honourable and eminent, are legally untrained, whilst it requires a civil suit for the smallest ordinary debt to be heard before a professional lawyer. The evil is the greater because criminal practice, being badly paid, does not attract the most experienced advocates; because the Bench at Sessions, being a numerous body, have less sense of responsibility than an individual judge; and, till 1907, because—whilst civil cases

Court of Quarter Sessions, whether for a county, a city or a borough, has both an original and an appellate jurisdiction.

(A) As a court of first instance it can try all indictable offences except[1]:

(i) Such felonies—other than burglary—as are punishable, on even a first conviction, by penal servitude for life or by death[2].

(ii) Certain specified crimes which, though less grave than those already enumerated, are likely to involve difficult questions of law; *e.g.*, præmunire, forgery, bigamy, concealment of birth, perjury, libel, the offences created by the Criminal Law Amendment Act, 1885[3], and the statutory offences of misappropriation by bankers, agents, and trustees[4].

For all indictable crimes, except these two classes, Courts of Quarter Sessions have a jurisdiction concurrent with that of the Assizes[5].

(B) All Courts of Quarter Sessions have also an appellate jurisdiction, (extending to questions not only of law but even of fact), over certain classes of cases that have been tried at

admitted of new trials and of ready appeals—in the Quarter Sessions, if the jury (perhaps through the court's unskilfulness) came to a wrong conclusion, there was no new trial, and if the court fell into an error of law there was no appeal, unless it consented to permit one. See Lord Brougham's *Speeches*, II. 374.

[1] 5 and 6 Vict. c. 38. Before this Act it could try any crime, except treason and (it is hard to say why) perjury and forgery (2 East 18); though in practice it rarely dealt with the most serious felonies.

[2] Sessions have now been authorised (59 and 60 Vict. c. 57) to try any cases of burglary that are *not* grave or difficult. More than two-thirds of the indictments for burglary, actual or attempted, are now tried by them.

[3] 48 and 49 Vict. c. 69.

[4] *Supra*, p. 235.

[5] More than twice as many prisoners are tried by Quarter Sessions as by the Assizes and the Central Criminal Court together. Thus in the latest year for which statistics are available (1905), only 3,682 persons were tried at these latter courts, but 8,640 at Quarter Sessions. Of the latter rather more than two-thirds went to the Quarter Sessions of counties, and rather less than one-third to those of boroughs.

Petty Sessions. But its details can more conveniently be considered in connexion with the latter tribunals.

VII. *The Coroner's Court.*

The Coroner's Court, which has a history stretching back for seven hundred years[1], is still held as a Court of Record for inquests upon cases of homicide or sudden death[2]. But its criminal function is only to accuse and not to try. The finding of a Coroner's inquest, accusing a prisoner of murder or manslaughter is equivalent to an indictment by a grand jury. It is the practice, however, in such cases to take the precaution of also preferring a bill of indictment before the grand jury; and if this bill is thrown out it is not usual to offer any evidence upon the coroner's inquisition. But if they do find a true bill, the accused can be tried upon both the indictment and the inquisition together[3].

VIII. *Petty Sessions.*

These constitute a noteworthy survival of the mediæval idea of a Popular justice; (now generally superseded[4] by the Royal justice, which acts only, as Magna Charta provides (s. 45), through professional experts "*qui sciunt leges regni*"). For they are composed of justices of the peace; gentlemen, not necessarily of legal experience, nominated to their office by the Lord Chancellor; (who acts on the advice of the Lord Lieutenant in the case of the county justices, and of the Home Secretary in the case of borough[5] justices). The sittings of Petty Sessions constitute the basis of the govern-

[1] See Pollock and Maitland, I. 879; and the Introduction to the Selden Society's *Select Coroners' Rolls.*

[2] 1 Bl. Comm. 346. [3] 1 East P. C. 371.

[4] Stubbs' *Constitutional History*, I. ch. XIII.; Hearn's *Government of England*, ch. III. § 5.

[5] By the Municipal Corporations Act 1882, s. 156, (following the similar Act of 1835), the Crown may, on the petition of any Borough, grant it a separate commission of the peace. But the persons appointed to act as justices under this are not thereby authorised to act in any Quarter Sessions.

ment of this country; by being held in every locality, and with great frequency, they effectively secure public order and tranquillity. Through them "more than through any other agency (except the tax-gatherer) are the people brought into contact with the Government[1]." In the scale of dignity such sittings of justices of the peace are the lowest of our criminal courts; but the amount of work done by them is so vast that they play a far more important part in our penal system than some tribunals of much greater dignity. The vast majority —more than three-quarters of a million annually—of our criminal cases are entirely disposed of by justices, outside their Quarter Sessions; and almost all the remainder are commenced before them. General consent, corroborated by statistical evidence[2], testifies that in these matters—where, as there is no jury, the questions for the bench to decide are far oftener of fact than of law, and where no punishment of great severity can be imposed—the justices discharge their duties with conspicuous success.

In exercising some of their many functions they do not constitute a court at all (although they may have to take evidence and act on it); as in some of their licensing duties[3]. In others, although they do constitute a court, it is not one of summary jurisdiction; as when conducting a merely preliminary examination into some grave charge, which they will send to be tried by a jury[4]. And even when sitting as a court of summary jurisdiction, to try a charge and adjudicate upon it finally, they do not always constitute a "Petty Sessional Court[5]"; as when sitting in a building which they only occasionally use.

[1] Lord Brougham, *Speeches*, II. 377.

[2] *Infra*, p. 438. The most authoritative of all foreign critics of our institutions pronounces English justices of the peace to exhibit "den Charakter des Richteramts in seiner besten Gestalt"; (Gneist, *Englische Verfassungsgeschichte*, p. 654).

[3] *Boulter* v. *Justices of Kent*, L. R. [1897] A. C. 556.

[4] *Infra*, p. 446. [5] *Infra*, p. 429. Yet they still are a "Petty *Session*."

CHAPTER XXIX.

SUMMARY PROCEDURE.

THE summary jurisdiction of justices of the peace is the creation of statutes. Parliament has thus immeasurably extended the common-law powers of justices, whilst at the same time reducing to a minimum[1] their legal responsibility; and the steady tendency of modern legislation is towards giving enhanced importance to these courts of summary jurisdiction. It will be advisable, therefore, to consider their procedure somewhat fully.

This summary jurisdiction is not exclusively criminal, but extends also to a few civil cases. It may in some matters be exercised, (though even in them only to a limited extent), by a single justice; but in most it is necessary to have either two ordinary justices[2] or a stipendiary magistrate[3]. It is always subjected to a stringent limitation of Time; for it

[1] See now 11 and 12 Vict. c. 44.

[2] If several justices sit, the majority decide. The Chairman has no casting vote. Accordingly if the votes be equal, the matter must either drop in order to be renewed before a different Court, or else one justice must withdraw his vote—perhaps the junior, or one whose vote is opposed to that of the Chairman.

[3] A stipendiary magistrate must be a barrister of several years' standing; and accordingly is empowered to exercise all the power that a full petty-sessional court of two justices would possess. Stipendiaries are appointed not only in the Metropolis but also in some provincial towns. If a provincial stipendiary happens to sit with other justices, he has only a single vote; but a London stipendiary is the sole judge, even though other justices be on the bench with him.

can only be exercised within the six months following "the time when the matter arose[1]." And for its exercise[2] a prescribed Place of meeting is now made essential; in order to secure ready access for the public. Two classes of such places are recognised.

(1) The habitual place of meeting of the justices of the locality—their "petty sessional court-house[3]." *Two* justices, by sitting here, constitute themselves a "Petty Sessional Court"; and such a court alone can exercise the summary jurisdiction to the full. For a single justice, wherever sitting, can only hear certain classes of cases; and even in them he can pass only a limited sentence—an imprisonment of not more than fourteen days, or a fine of (including costs) not more than twenty shillings[4].

(2) In counties, even the area of a single petty-sessional division may be so wide as to make it convenient to provide for it subsidiary places of meeting, for use in case of emergency. Such a place is called an "occasional court-house[5]." When sitting in it, even a bench of two or more justices can inflict no greater sentence than that which a single justice could; though they are not limited to his range of cases[6].

Justices can compel the attendance of any witness in any case before them, (alike in their summary jurisdiction[7], both civil and criminal, and also in their preliminary hearings of indictable offences[8]), by issuing a summons to him to come, or even, in case of need, a warrant to bring him. The hearing of any matter within the summary jurisdiction is commenced by stating to the defendant the

[1] 11 and 12 Vict. c. 43, s. 11; (one of "Jervis's Acts").
[2] Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49).
[3] See 42 and 43 Vict. c. 49, s. 20 (3).
[4] 42 and 43 Vict. c. 49, ss. 20 (7), 20 (9), 49.
[5] *Ibid.* s. 20 (4). [6] s. 20 (7). [7] 11 and 12 Vict. c. 43, s. 7.
[8] 11 and 12 Vict. c. 42, s. 16.

substance of the information or complaint[1]. If he denies its truth, the case proceeds. The prosecutor, or complainant, opens his case by a speech; and then calls his witnesses, who are examined in chief, cross-examined, and re-examined. The defendant may then similarly open his case, and his witnesses are similarly heard. The other party may then, if necessary, call rebutting evidence. But neither side has (as at trials before a jury) any right to make a second speech, unless some point of law arises. The decision of the justices is then given. If it be against the defendant, they have power, both in civil and in criminal cases, to adjudge him to pay to his opponent such costs as they shall think fit. If, on the other hand, they dismiss the case, they can similarly direct costs to be paid to the defendant.

The summary jurisdiction of Petty Sessions covers, as we have said, both civil and criminal cases.

(1) The civil jurisdiction is the less important. Amongst the matters coming within it are bastardy proceedings;

[1] The "information" (or, similarly, the "complaint") is at once the foundation of the justices' jurisdiction and the definition of the charge (*Reg.* v. *Hughes*, L. R. 4 Q. B. D. 614); it is in the nature of an indictment. (The summons or warrant is, on the other hand, a mere process to secure the defendant's presence; and consequently its absence or its illegality does not affect the jurisdiction of the court, so long as he is in fact present before it to answer to the accusation.) But the charge so defined by it need not be adhered to with such strictness as an indictment is. For, as Lord Russell said, the hearing is not "of," but only "based on" the information. By 11 and 12 Vict. c. 43, ss. 1, 9 the justices may disregard any small variance between the information (or complaint) and the evidence adduced in support of it, and give judgment against the defendant accordingly; unless he has been so far misled by the variance that it is right to adjourn the proceedings to enable him to meet the charge in the shape it has now assumed. (But they are not authorised actually to "amend" the summons or information or complaint, as is so often done, in order to fit it to the unexpected evidence that is thus given.) This provision, however, only applies to variances in the mere circumstances of the charge; not to evidence which discloses some charge legally different from that alleged in the information or complaint, even though the difference be only that between being "drunk and riotous" and being "drunk"; *Martin* v. *Pridgeon*, 1 E. and E. 778.

disputes between employers and workmen; claims for poor rates, or for contributions due under the Public Health Acts from the owners of house property, for the making of streets or the repair of sewers, (contributions which are sometimes of large amount[1]). These civil proceedings are commenced by a "complaint." It is never made on oath, and need not be made in writing[2]. Only a summons can in the first instance be issued; though, if the defendant fails to appear in obedience to the summons, a warrant for his arrest may then be issued, if the complainant substantiates his claim upon oath[3]. As in all other civil proceedings, the defendant can be compelled to give evidence on oath. If the case be decided in favour of the plaintiff, it can only produce an order to pay money, which creates a mere "civil debt." Hence payment of it cannot be enforced by imprisonment; except in case of wilful non-payment[4], when the defendant has it in his power to pay; and even then it is only a civil and not a criminal imprisonment.

(2) The summary jurisdiction in criminal cases covers some hundreds of offences; *e.g.*, many petty forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the bye-laws that secure order in streets and highways, and trivial violations of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education[5]. The proceedings commence with an "information," which (unlike a "complaint") must usually be in writing; and may (though it

[1] *E.g.* £546 from one estate; *Corbett* v. *Badger*, L. R. [1901] 2 K. B. 278.

[2] 11 and 12 Vict. c. 43, s. 8.

[3] *Ibid.* s. 2.

[4] Or, in the case of a bastardy order (42 and 43 Vict. c. 49, s. 54).

[5] Occasionally a severe pecuniary penalty is possible; *e.g.*, that for keeping a betting-house may amount to £100, (16 and 17 Vict. c. 119, s. 3); and that upon a railway company which provides any special facilities for conveyance to a prize fight, may amount to as much as £500, and must not be less than £200, (31 and 32 Vict. c. 119, s. 21).

need not) be on oath. If it be on oath a warrant may, even in the first instance, be issued for the arrest of the defendant[1]. If it be not on oath, only a summons can be issued in the first instance[2]; though if the defendant fails to appear in answer to the summons, a warrant will then be issued[3]. At the hearing, as the proceedings are criminal, the defendant cannot be compelled to give evidence; though since the Act of 1898[4] he now can do so if he desires. If the hearing results in a conviction the sentence may impose imprisonment or a fine; and payment of the fine is enforceable by (criminal) imprisonment. The justices are invested in these criminal cases with a remarkable statutory power of shewing mercy[5]. For if, though the charge is proved, they think it unwise[6] actually to punish, they may discharge the offender on his giving security to be of good behaviour and appear when called on; or they may even, in spite of the charge being proved, dismiss it altogether. But, in taking either course, they may, if they like, order the defendant

[1] 11 and 12 Vict. c. 43, s. 2.

[2] Of the persons thus tried summarily for non-indictable offences, about five come on summons to about every four on arrest. Moreover arrest for summary offences is usually effected (*i.e.*, in about 36 such arrests out of every 37) without a warrant.

[3] It is a fundamental rule of common law procedure that anyone who is accused of crime must appear in person at the bar of the criminal court. But the legislature has authorised courts of summary jurisdiction to try an offender in his absence (11 and 12 Vict. c. 43, s. 13). Thus if a defendant who has been served with a summons does not appear at the appointed time, the justices may either issue a warrant to bring him up, or they may instead proceed to hear and determine the case without him. This remarkable innovation is due to the fact that the charges heard in these courts are often so trivial that it might be oppressive to insist on the personal attendance of the defendant. But in London, as the defendant is less likely to reside at any serious distance from the court, this power to proceed *ex parte* is limited to civil cases.

[4] 61 and 62 Vict. c. 36; *supra*, p. 400.

[5] And they exercise it in nearly five per cent. of their cases.

[6] *E.g.*, from the character, antecedents, age, health, or mental state of the offender; or from the triviality of his offence.

to pay to the prosecutor, as damages, any sum up to ten pounds[1].

The summary criminal jurisdiction was originally concerned only with non-indictable offences; but it has since been extended to some exceptional cases of indictable ones. Some of these are misdemeanors. Thus, as already mentioned[2], assaults (when not so grave as to be of a felonious character[3]) may be thus tried, provided that the person assaulted be himself the prosecutor. And, by consent of the accused, charges of libel when brought against the publishers of a *newspaper*[4] may also be tried summarily. And even some cases of felony may be thus tried.

By the Summary Jurisdiction Acts, 1879 and 1899[5], power has been given to Petty Sessional Courts to deal summarily with three classes of offenders, instead of committing them (as at common law was the only course) for trial by a jury. The power is only to be exercised if, during an examination for such commitment, the justices "become satisfied by the evidence that it is expedient to deal with the case summarily." The expediency will, of course, depend both upon the circumstances of the particular case and also upon the antecedents of the person accused. But even when the justices desire thus to try an offender summarily, his own

[1] 7 Edw. 7, c. 17, s. 1 (3); superseding s. 16 of the Summary Jurisdiction Act 1879. "It would be well"—I have heard Lord Brampton remark—"if justices oftener bore in mind this power of awarding damages."

[2] *Supra*, p. 159. If a husband is convicted of an *aggravated* assault upon his wife, the justices may, if they think fit, make a separation order, and also require the husband to pay a weekly sum for the support of his wife.

[3] 24 and 25 Vict. c. 100, ss. 39, etc. Nor when it is charged as an "affray" *i.e.*, fighting in a public place, so as to cause general affright.

[4] 44 and 45 Vict. c. 60, s. 5. But the libel must be of only a trivial character, and the only punishment that can be inflicted is a fine (which must not exceed £50).

[5] 42 and 43 Vict. c. 49; 62 and 63 Vict. c. 22. Four-fifths of all the trials for indictable offences now take place thus.

consent[1]—or, if he be a child under twelve, the consent of his parent or guardian—will also be necessary to waive his common-law right of being tried by a jury. The three classes who may thus be dealt with are the following:

(i) Infants under twelve years of age, when charged with any indictable offence whatever, except homicide. But the punishment must not exceed one month's imprisonment or a fine of forty shillings, with or without a whipping; and a whipping may be ordered alone[2].

(ii) "Young persons," between twelve and sixteen years of age[3], when charged with any indictable offence whatever, except homicide. The limit of punishment is, however, extended to three months' imprisonment, with or without hard labour; or, instead, to a fine of £10.[4]

(iii) Adults[5] only when charged with the following particular offences:

(*a*) Simple larceny, thefts punishable like larceny, larceny from the person, larceny as a clerk or servant, embezzlement, receiving stolen goods, obtaining goods by false pretences, setting on fire plantations or heaths[6] &c., when the value of the property stolen (or of the damage done by the fire) does not exceed *forty shillings*; and also charges of merely attempting to commit any of these offences (except embezzlement), however

[1] Such consent is usually given readily; in order to avoid the risk of imprisonment whilst awaiting trial, and of receiving a severer sentence than it is possible for the Petty Sessions to inflict. Hence, though this jurisdiction is not available in all cases of indictable crimes, yet about four times as many such crimes are tried under it as are tried by actual indictment; (thus, in 1905, the respective numbers were 49,138 and 12,325).

[2] 42 and 43 Vict. c. 49, s. 10 (1). [3] *Ibid.* s. 11 (1).

[4] In the case of a male under fourteen, twelve strokes of a birch rod may be ordered; either along with, or instead of, the fine or the imprisonment.

[5] If, in consequence of some previous conviction on indictment, the accused *adult* would be liable to penal servitude for this new charge, if indicted for it, the summary jurisdiction will be ousted (42 and 43 Vict. c. 49, s. 14). It is not ousted if the previous conviction has been only at Petty Sessions.

[6] 24 and 25 Vict. c. 97, s. 16.

great may be the value of the property. But the punishment must not exceed imprisonment, with or without hard labour, for three months; or, instead, a fine of not more than £20 may be inflicted[1].

(*b*) The offences thus enumerated in (*a*), however great may be the value of the property, if the adult *pleads guilty*. The punishment can only be imprisonment, with or without hard labour, for not more than six months; there is no option of a fine[2].

By a converse innovation, the Summary Jurisdiction Act, 1879, has made it possible for the graver of the non-indictable offences to be dealt with, instead, by indictment. For it enacts[3] that any offence (except assault) for which, on summary conviction, a sentence of imprisonment for more than three months can be imposed, shall be dealt with by indictment if at the hearing, but before the charge has been gone into, the defendant claims to be tried by a jury[4].

An important restriction upon all exercise of summary jurisdiction by justices must be noticed. In consequence of the difficulties of the English law of land, they have immemorially been debarred from dealing with any question which involves the decision of a *bonâ fide* and reasonable claim to real property or to some right therein[5]. Hence if a riotous crowd pull down the fences enclosing a piece of land which is part of a gentleman's estate, but which they reasonably believe to be common land, the justices cannot try any charge brought against them for the damage they have done.

[1] 42 and 43 Vict. c. 49, s. 12 and Schedule I.

[2] *Ibid.* s. 13. When dealing summarily with indictable offences, there is no *express* power to order the defendant to pay costs. But if (as usually happens) the offence is a felony, an order for costs may be made under s. 3 of the Forfeiture Act, 1870.

[3] 42 and 43 Vict. c. 49, s. 17.

[4] Accordingly, when any person appears before justices upon a charge of any such offence, they must—before taking any evidence—inform him of his right to be tried by a jury; (42 and 43 Vict. c. 49, s. 17 (2)).

[5] *Reg.* v. *Cridland*, 7 E. and B. 853.

The practical importance of the various powers of justices is vividly shewn by the figures of the judicial statistics of every year. Thus, in 1905, in addition to all the civil cases which they determined, they decided summarily no fewer than 729,727 charges of petty offences, as well as 49,138 charges of indictable offences[1] against persons who elected to be tried summarily; besides committing about 12,325 persons for trial before a jury[2].

APPEALS FROM PETTY SESSIONS.

There are, as we have already seen, two tribunals by which the summary proceedings of justices may be reviewed; the King's Bench Division[3] and the Quarter Sessions[4].

(1) The control of the King's Bench Division is exercised in two ways:

(*a*) It may issue a writ of *Certiorari* to bring up a conviction, and quash it, if necessary, for some defect of law which vitiates it; *e.g.*, if the justices have convicted on an "information" that was not laid within the six months[5].

[1] In both classes there are about four times as many convictions as acquittals. Of the persons convicted, only one-twelfth are imprisoned.

[2] A further and a noteworthy (though not a strictly official) service rendered by justices' courts is that of giving advice to the poor in their legal difficulties. Sir James Vaughan, the late Chief Magistrate of the metropolis says:—"To our courts the poor resort with confidence; they come and lay before us their own various troubles and difficulties, and cases of oppression which they have met with; and they ask our advice. The confidence thus engendered amongst the people of a district is such that very many wrongs are redressed without issuing any summons at all, simply by the magistrate's sending a message by a constable to the party complained about." A French eyewitness of these consultations found "quelque chose de frappant à voir la confiance qu'ont les malheureux dans la bonté des magistrats. C'est pourquoi la justice reste toujours populaire." (Franqueville, *Syst. Jud. G.-B.*, II. 326.)

[3] *Supra*, p. 423.

[4] *Supra*, p. 425.

[5] *Supra*, p. 429. This Division may also intervene to compel justices to perform duties devolving upon them; *e.g.*, by granting a Mandamus, or rule, requiring them to issue a summons or to hear and determine a charge.

(*b*) It may determine any case which justices have themselves stated for its decision, as to any point of law that has been determined by them[1], (whether apparent on the face of the proceedings, or not); *e.g.*, where they have overruled a defendant's objection that the evidence against him was not legally sufficient to support a conviction. They may state such a case at the instance of either party; (not merely, as in a Crown Case Reserved[2], at the instance of the defendant[3]).

(2) The appellate jurisdiction of Quarter Sessions[4] is not, like that of the King's Bench, coextensive with the whole range of the summary jurisdiction of justices. It arose first in the case of particular offences to which it has been expressly attached by the respective statutes that prohibited them. And for most of the non-indictable offences such an appeal has thus been allowed to the defendant; and occasionally even to the prosecutor. Moreover, the Summary Jurisdiction Act, 1879[5], has made a general provision by which every person whom a court of summary jurisdiction has sentenced to *imprisonment* without the option of a fine, may appeal to Quarter Sessions, (unless in the lower court he admitted his guilt). On the other hand, these appeals are not—like those to the King's Bench Division—limited to questions of law; for the Quarter Sessions hear the whole case over again[6]; (even new witnesses, who were

[1] 20 and 21 Vict. c. 43, s. 2; 42 and 43 Vict. c. 49, s. 33. [2] *Supra*, p. 420.

[3] Even when justices have refused to state a case, the King's Bench Division may order them to do so; (42 and 43 Vict. c. 49, s. 33).

[4] *Supra*, p. 425.

[5] 42 and 43 Vict. c. 49, s. 19. In *London*, any fine over £3 admits of appeal; 2 and 3 Vict. c. 71, s. 50.

[6] Accordingly it is not here, as in appeals in higher courts, for the appellant to shew that the decision of which he complains was wrong; but for the respondent to shew that it was right. Hence if the prosecutor does not appear, the Quarter Sessions will have to quash the conviction (*Reg.* v. *Purdey*, 5 B. and S. 909); and this even when the appellant does not dispute its validity, but protests only against the severity of the sentence.

not heard at the Petty Sessions, being admissible). The appeal is heard before the justices of the Quarter Sessions alone, without any jury[1].

[1] The number of cases in which any of these appeals are made, either to the King's Bench or to Quarter Sessions, is very small; the yearly average being less than a hundred to the former, and about a hundred and fifty to the latter, though the yearly total of summary convictions for non-indictable offences is near 600,000. In 1899, the appeals to the King's Bench were six by certiorari, and 105 by cases stated; and fully one-half of them were unsuccessful. It may safely be estimated that there is only one appeal to Quarter Sessions for every three thousand of those convictions in which there is a power so to appeal. Doubtless considerations of expense have much to do with this; yet, even after allowing for them, these statistics, coupled with the further fact that only a quarter of the appeals to Sessions are entirely successful, afford noteworthy evidence of the satisfactory working of our courts of summary jurisdiction. After close personal observation of our English police-courts, a learned French lawyer, the Comte de Franqueville came to the conclusion that "il est difficile d'imaginer une organisation plus simple, plus pratique, plus prompte, ou plus humaine"; (*Le Système judiciaire de la Grande-Bretagne*, II. 710).

CHAPTER XXX.

ORDINARY PROCEDURE.

I. Preliminary Steps.

From the modern, and purely statutory, form of procedure which prevails in courts of summary jurisdiction, we now pass to the more ancient form which prevails in those courts where offenders are tried in the common-law manner, that is to say, by a jury. In this procedure—still styled "ordinary," yet now far rarer than the summary—there are ten possible stages which call for explanation. These are:—1. Information; 2. Arrest; 3. Commitment for trial; 4. Prosecution, *i.e.*, Accusation; 5. Arraignment; 6. Plea and issue; 7. Trial and verdict; 8. Judgment; 9. Reversal of judgment; 10. Reprieve or pardon.

During the greater portion of the history of English criminal law its provisions for the detection and arrest of offenders were[1], as we have said[2], very defective. In the earliest times, indeed, excellent provision had been made by the system of Frankpledge[3]. A frankpledge was a group of adult males—sometimes all those within a particular township, sometimes only a "tithing" or group of ten, selected individually—who were liable to amercement if they did not surrender to justice any one of their number who committed a crime (each individual in the group is also sometimes called a "frankpledge"). This institution apparently only

[1] "In 1800, in no department of English government was inefficiency so pronounced as in that of police"; W. L. M. Lee's *History of Police*, p. 214.

[2] *Supra*, pp. 29, 280.

[3] Pollock and Maitland, I. 554—558.

existed south of the Humber; but probably arose there as far back as the Anglo-Saxon period. From at least the time of Henry I. a "view of frankpledge" was taken by the sheriff periodically, at which the above-mentioned amercements were collected. After the frankpledges fell, in the fourteenth century, into decay, England possessed no effective machinery for arresting criminals or for preventing the commission of crime, until the creation, by Sir Robert Peel's energy, of the modern police force. Even in London, as is stated in the preamble to his Act of 1830[1], "the local establishments of nightly watch and nightly police were found inadequate to the prevention and detection of crime, by reason of the frequent unfitness of the individuals employed, the insufficiency of their number, the limited sphere of their authority, and their want of connection and co-operation with each other." But since the successive establishment of metropolitan, borough, and county police-forces, the detection of offenders is so efficient that in over seventy-two per cent. of the known cases of indictable crime, a prosecution takes place; and two-thirds of the prosecutions succeed.

1. *Information.*

Every justice of the peace has by his commission the duty of "conserving the peace" by taking active steps to exact securities from suspected persons, to suppress riots, and to apprehend offenders. These duties he still actively exercises; (though, since the accession of the House of Hanover, the judges of the King's Bench Division, on whom also they are conferred, have ceased to do so, regarding as more constitutional that differentiation of function which keeps the judicial office apart from all the strictly executive work of government[2]).

Hence in ordinary procedure, just as in summary, the first step usually is to lay an "information" before a justice

[1] 10 Geo. IV. c. 44.

[2] Cf. Lord Campbell's *Lives of the Chief Justices*, III. 410.

of the peace[1]. It may be laid by any person who is aware of the facts, whether or not he be the person aggrieved. It usually is not technically necessary that it should be in writing or be upon oath. But unless both these formalities are observed, the justice can only issue a summons to the accused to attend, instead of a warrant for his arrest.

2. *Arrest.*

Where there is good ground for supposing—as, for instance, from the gravity of the charge—that a mere summons would not suffice to secure the attendance of an accused person, he must be arrested[2], in order to bring him before a magistrate. On accusations of indictable offences, a warrant is sometimes—yet in less than ten per cent. of the arrests for such crimes—obtained, in order to authorise the arrest. But (as we shall subsequently see[3]) the cases in which arrest is legally permissible, without any such special authorisation, are numerous.

I. Special authorisation for arrest always takes in modern times the form of a written warrant[4]. This may be issued in cases of political crime by a Secretary of State or any other Privy Councillor, or, in any criminal case whatever, by a judge of the King's Bench Division or (as

[1] *Supra*, p. 429. The student must not confuse such informations with the much rarer and more formal "informations," addressed to the King's Bench Division by officials of the Crown, which are a substitute for indictments; *infra*, p. 453. The justice may belong either to the district where the offence was committed or to that where the offender is.

[2] All arrest before trial seems inconsistent with Magna Charta; but a literal observance of the provisions of the Charter would prevent the enforcement of justice. For the early law of arrest, see Pollock and Maitland, *Hist. Eng. Law*, II. 580—583. [3] *Infra*, p. 443 et seq.

[4] In early times (see Pollock and Maitland, II. 577) it was the duty of anyone who discovered that a grave crime had been committed to raise orally a "hue and cry"; (*hue* is an exclamation of pursuit, akin to *hoot*). This gave the same powers of arrest to all taking part in it as a written warrant now-a-days would.

usually happens) by a justice of the peace[1]. It authorises the person executing it to arrest the person therein described. When executing the warrant, he must have it with him; (except in cases where he could have arrested without one). Since the charge is not a civil but a criminal one[2], he is allowed to break open even the outer doors of a house if he cannot otherwise seize the person who is to be arrested (*e.g.*, if those in the house will not give him up). If the charge be one of treason, felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest of the accused, even to the infliction of wounds or death upon him; whilst if, on the other hand, the latter should kill the arrestor he will be guilty of murder[3]. But if a constable attempts to arrest offenders illegally (*e.g.*, on a void warrant) they will be guilty only of manslaughter if, in resisting such an arrest, they kill the constable[4].

[1] If issued by an ordinary justice of the peace, it can only be executed within the district to which his commission extends; though it can be executed in any other county or district as soon as it has been "backed" by any justice who is commissioned there. But a warrant issued by a metropolitan police magistrate for any matter arising within the metropolis may be executed anywhere without backing (2 and 3 Vict. c. 71, s. 17); and a warrant issued by a borough justice may be executed at any place in the particular county in which the borough is situated, without backing (45 and 46 Vict. c. 50, s. 223). When a warrant has been executed outside the district of the justice who issued it, the accused is usually taken back to be examined in that district. But it is permissible for him to be instead brought before some justice of the place of his arrest (11 and 12 Vict. c. 42, s. 11); though, even then, the trial at the Assizes or Sessions will usually take place in the district where the warrant was originally issued.

[2] *Harvey* v. *Harvey*, L. R. 26 Ch. D. 644.

[3] If the warrant were only on a charge of misdemeanor, it would equally be murder to kill the arrestor (Foster, p. 311); yet the arrestor would not be justified in killing the accused man merely to prevent his flight; though should the man actively resist arrest, he will be justified in counteracting this resistance by any necessary force (*i.e.*, he may, and must, stand his ground, instead of first trying to avoid a conflict in the manner that the law requires in ordinary cases of self-defence (2 Hale 118)).

[4] *Rex* v. *Curvan*, 1 Moody 132.

II. Even when no warrant has been issued, the common law often permits an arrest to be effected; a permission accorded not only to a constable but even to private persons. The power has been further extended by modern statutes, especially in the case of constables.

(A) A private person, without any warrant, may arrest

(i) Any person who, *in his presence*, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal[1]. And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping; so that if the felon's death results, the case will be one of justifiable homicide[2].

(ii) Any person whom he reasonably suspects of having committed a treason or felony or dangerous wounding, provided that this crime has been actually committed by some one (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, the law, though permitting a mere private person to make an arrest, (and so making it murder for a guilty man to kill him by resisting it), does not command him to do so; and hence confers no general right to effect it by breaking into a house or by using a fatal degree of violence[3].

[1] 2 Hawkins P. C. c. 12, s. 1. Besides this power to arrest, with a view to permanent detention, a person who actually has committed grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is *about to* commit a treason or felony or even a breach of the peace, and detaining him *temporarily*, until the danger is over (2 Hawkins P. C. c. 21, s. 19; 2 Coke Inst. 52).

[2] 1 Hale P. C. 481, 484.

[3] According to Hale (2. 78) the private person will be held justified for arresting the suspected felon, even in these violent ways, if the suspicion do ultimately prove to have been correct; but he uses all such violence at his peril, and not, as in case (i), by a general right.

(iii) In addition to these two common-law powers, modern statutes permit any private person to arrest anyone whom he "finds[1]" (α) signalling to a smuggling vessel[2]; or committing any offence under (β) the Vagrant Act[3], (γ) the Larceny Act, 1861[4], or (δ) the Coinage Offences Act, 1861[5]; or (ε) committing *by night* any indictable offence whatever[6];

(iv) or, if the arrest be authorised by the owner of the property concerned, anyone whom he finds committing any offence against (α) the Malicious Damage Act, 1861[7], (β) the Night Poaching Act[8], (γ) the Town Police Act[9], or (δ) the Metropolitan Police Acts[10].

(B) A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover as his official position renders it in all these cases a duty for him to make the arrest, it will, in any of them, be a murder to kill him by resisting arrest[11].

(i) Like a private person he may arrest anyone who commits, in his presence, a treason, or felony, or dangerous wounding; and may break doors or use fatal violence if necessary.

(ii) (Unlike a private person[12]) he probably may arrest for permanent detention anyone who, in his presence, commits even a mere breach of the peace[13].

(iii) He may arrest anyone whom he reasonably suspects of treason, or felony, or dangerous wounding, whether (unlike

[1] Accordingly, if the offender has completed the offence, even though he has gone "but a single yard" away before detection or even before apprehension, it is too late to arrest him.

[2] 39 and 40 Vict. c. 36, s. 190.

[3] 5 Geo. IV. c. 83, s. 6, *supra*, p. 320.

[4] Or any one offering stolen goods for sale or pawn; 24 and 25 Vict. c. 96, s. 103.

[5] 24 and 25 Vict. c. 99, s. 1.

[6] 14 and 15 Vict. c. 19, s. 11.

[7] 24 and 25 Vict. c. 97, s. 61.

[8] 9 Geo. IV. c. 69, s. 2.

[9] 10 and 11 Vict. c. 89, s. 15.

[10] 2 and 3 Vict. c. 47, s. 66, and c. 71.

[11] Cf. *Reg.* v. *Phelps*, C. and M. 180.

[12] *Supra*, p. 443, *note* 2.

[13] 1 Hale P. C. 587; 2 Hale P. C. 90. But see East P. C. c. 5, s. 71.

the restriction on such arrest by a private person) the crime has *actually* taken place or not[1]. It would seem that in these arrests also he may use any necessary violence even though fatal, and may break outer doors; but some authorities limit these powers to cases where the crime has actually taken place[2].

(iv) Like a private person, he may arrest in the five cases in (A) (iii).

(v) And, even *without* any authorisation of the owner of the property, in the four cases enumerated under (A) (iv).

(vi) He may arrest any person loitering at night in a highway or yard, whom he reasonably suspects of having committed, or even of being about to commit, a felony against the Larceny Act, 1861, the Malicious Damage Act, 1861, or the Offences against the Person Act, 1861[3].

(vii) In *London* a constable may also arrest (α) any person reasonably suspected of having committed, or even about to commit, *any* indictable offence; and even (β) anyone loitering at night who cannot give a satisfactory account of himself[4].

As a person who arrests another without waiting to obtain a warrant usually does so because he must act instantly, if he is to act at all, the law on the subject ought to be clear and simple. But as the foregoing summary sufficiently shews, modern legislation has rendered it highly

[1] *Lawrence* v. *Hedger*, 3 Taunton 13; *Beckwith* v. *Philby*, 6 B. and C. 635. These cases shew that the constable's privilege, where the supposed crime has not in fact taken place, extends to cases where he acts merely on his own suspicion; and is not (as is sometimes said) limited to those in which some third person has made the charge. As to its being murder for the supposed felon to kill the constable, even where no felony has actually taken place, see *Rex* v. *Woolmer*, 1 Moody 334.

[2] See East P. C. c. 5, ss. 68, 87; 2 Hale P. C. 92; 2 Hawkins P. C. c. 14; 1 Douglas 359.

[3] The authority is conferred by ss. 104, 57, and 66 of these respective Acts.

[4] 2 and 3 Vict. c. 47, s. 64.

complicated, and (to use the words of a very learned writer) "most unsatisfactory and—to private persons—almost a snare[1]."

3. *Commitment for Trial.*

Of the persons who appear before justices of the peace, for preliminary examination upon charges of indictable crime, little more than nine per cent. come in mere obedience to a summons[2]. The others are brought up in custody; not quite nine per cent. under warrants, and the remaining eighty-two per cent. after being arrested without a warrant[3].

As the summons or warrant is merely a process to secure appearance, the justice must take cognizance of any information laid against the defendant when before him (even upon an illegal arrest), and may commit him to trial thereon[4].

A preliminary examination (unlike most of the summary hearings) never requires the presence of more than a single justice[5]. There is full power of compelling the attendance of witnesses[6], either by summons or (if necessary) by warrant; and if, on appearing, they refuse to give evidence, the justice may commit them to prison for a week or until earlier submission. At common law the accused could not, as a right, demand the assistance of an advocate, nor could the public

[1] Mr C. S. Greaves, Q.C., in his edition of the *Criminal Law Consolidation Acts* (p. 188).

[2] But in the case of persons tried for non-indictable offences, near sixty per cent. appear on mere summons, about forty per cent. on arrest without warrant, and only two per cent. under warrants.

[3] A person arrested without a warrant should be brought before a magistrate within twenty-four hours, and, if this is impracticable, the Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49, s. 38), provides that the police officer in charge of the police station may release him on his giving bail to appear at the preliminary examination.

[4] *Rex* v. *Hughes*, L. R. 4 Q. B. D. 616.

[5] And even if there be two or more they cannot technically be regarded as a "Petty Sessional Court" under the definition now established by statute; *supra*, p. 429, *note* 3.

[6] 11 and 12 Vict. c. 42, s. 16.

insist upon admission[1]. And it would seem[2] that this rule still holds good; in spite of the wide general language in which recent statutes[3] have required justices to act "in open court"; which, however, must be interpreted as restricted to cases of summary jurisdiction alone. The practice recently followed in some exceptional cases[4] of communicating only in writing the names and addresses of particular witnesses, and forbidding the accused to put any questions about them openly, is justifiable only in this view of the proceedings as being not necessarily public. It must be noted that at these preliminary inquiries the presence of the accused is absolutely essential[5].

The preliminary examination is conducted as follows. The prosecutor "opens his case" by any necessary explanation. Then his witnesses are examined in chief, cross-examined, and re-examined; their evidence being taken down in writing at the time by the clerk to the justices. The Crown witnesses having been heard, and their evidence summed up[6] by the prosecutor (if he wishes), the magistrate (or his clerk for him) then reads the evidence over to the accused, and states the charge. He then asks him if he has anything to say; telling him he need not say anything unless he likes, and has nothing to hope or fear from any promise or threat, and that whatever he says will be taken down and

[1] Cf. 11 and 12 Vict. c. 42, s. 19.

[2] *Boulter* v. *Justices of Kent*, L. R. [1897] A. C. 556. A contrary view was at one time taken by the law officers of the Crown.

[3] The Summary Jurisdiction Acts of 1879 (42 and 43 Vict. c. 49, s. 20 (1)) and 1884 (47 and 48 Vict. c. 43, s. 7) and the Interpretation Act, 1889 (52 and 53 Vict. c. 63, s. 13 (11)).

[4] *E.g.* at Bow Street (*The Times*, Jan. 1, 1896).

[5] 11 and 12 Vict. c. 42, s. 17. Contrast the power given to justices in their summary proceedings to try a defendant in his absence for petty offences, if he fails to appear when summoned; *supra*, p. 432.

[6] Oke's *Magisterial Synopsis*, p. 887; (contrast p. 430 *infra*). The solicitor for the accused may also be *now* heard.

may be used against him[1]. (He also asks whether he wishes to call witnesses[2].) The defendant may either remain silent, or leave it to his advocate to make a statement, or himself make one, (sometimes he hands in a written one, prepared for him by his advocate). If he do make a statement it is taken down in writing and afterwards read over to him and signed by one of the committing justices[3]. After this, the prisoner's witnesses[4], if any, are examined, cross-examined, and re-examined; and their evidence is taken down in writing. These "depositions" of the witnesses (for both prisoner and Crown) are signed by them and also by the justice[5]. Whether the defendant calls witnesses or not, the prosecutor's advocate has no further speech.

The justice (or, if there be more than one, the majority) must then determine (1) whether or not there is a strong enough case to justify committing the accused for trial[6]; and (2) if so, where that trial is to be. If the offence is one which Quarter Sessions are competent to try[7], the case must

[1] 11 and 12 Vict. c. 42, s. 18. It is only *against* the prisoner that this statement is evidence; and therefore it is for the Crown to determine whether or not to put it in at the trial. But the ordinary course is to put it in; and it is prudent to do so, for it may prove to be important to the Crown as contradicting evidence given for the prisoner. "What the prisoner said before the magistrates is not evidence unless the prosecutor choose to make it so; but if he does, it then becomes evidence for the prisoner as well as against him, *i.e.*, all parts of it"; *per* Park, J., in *Rex* v. *Higgins*, 3 C. and P. 603.

[2] 30 and 31 Vict. c. 35, s. 3. [3] 11 and 12 Vict. c. 42, s. 18.

[4] In prosecutions for libel (other than those against *newspapers*, 44 and 45 Vict. c. 60, s. 4) the defendant cannot, at this preliminary inquiry, raise the defence of the *truth* of the libellous matter, either by his own witnesses, or even by cross-examination. *Reg.* v. *Townsend*, 4 F. and F. 1089. See also *Reg.* v. *Carden*, L. R. 5 Q. B. D. 1.

[5] 30 and 31 Vict. c. 35, s. 3.

[6] According to the modern practice justices are "clearly bound not to commit anyone unless a *primâ facie* case is made out against him, and by witnesses entitled to a reasonable degree of credit"; *per* Bayley, J. (1 B. and C. 50).

[7] *Supra*, p. 425.

be sent thither, unless there are special reasons for preferring a trial at the Assizes[1]. Again, (3) if the accused ask to be released on bail[2] the court must determine whether this is to be allowed, and, if it be, on what terms. In cases of treason, however, bail cannot be granted by the justices, but only by a Secretary of State or a judge of the King's Bench Division[3]. But in cases of felony the matter is in the justices' discretion. In misdemeanors they had not, at common law, even a discretion (when once the preliminary examination was over), but were bound to release the accused on his finding adequate bail[4]. But now, by statute[5], several grave misdemeanors have, in respect to bail, been placed on the level of felonies; viz., perjury, attempts to commit felony, concealment of birth, false pretences, and the other offences for which the costs of the prosecution may be charged on the county[6].

The Bill of Rights forbids the requiring of "excessive" bail; but the justices must use their own judgment as to what sum is adequate without being excessive. Here, as also in exercising their discretion about admitting to bail at all, they have simply to consider what likelihood there is of the defendant's failing to appear for trial[7]. That likelihood will be affected by (1) the gravity of the charge[8]; (2) the cogency

[1] Assizes Relief Act, 1889 (52 and 53 Vict. c. 12).

[2] This word means properly (1) the contract whereby the man is "bailed" (*i.e.*, delivered) to his surety, but is also applied to (2) that surety himself. Either the justice or the surety may be spoken of as "bailing" the man. Such sureties were vividly described in the thirteenth century as "a living prison" (Pollock and Maitland, II. 583—587). Even now-a-days the surety, if he should desire to discharge himself, is allowed to arrest the defendant, and even to break into his house for the purpose, that he may give him back again into the custody of the court by which he was bailed; (1 Chitty, *Cr. Law*, 104; L. R. [1900] 1 Ch. 41).

[3] 11 and 12 Vict. c. 42, s. 23.

[4] *Supra*, p. 96.

[5] 38 and 39 Vict. c. 66.

[6] These offences are set out in 7 Geo. IV. c. 64; 14 and 15 Vict. c. 55; and 29 and 30 Vict. c. 52.

[7] *Reg.* v. *Rose*, 68 L. J. R. (Q. B.) 289.

[8] *Reg.* v. *Barronett*, Dearsly 1; *Re Barthelemy*, Dearsly 60. Bail has occasionally been allowed even on charges of murder, as where the circumstances pointed to a verdict of justifiable homicide.

of the evidence; (3) the wealth of the offender (which renders him more willing to bear the forfeiture of bail and also less willing to bear the disgrace of a conviction); (4) whether the proposed sureties are independent or are likely to have been indemnified by the accused[1]; and (5) the probability of the accused tampering with the Crown's witnesses, if he be at large[2]. But experience shews that, on the whole, very few persons admitted to bail fail to appear for trial—only about one in every thousand[3]. Hence of recent years the judges have urged[4] magistrates to grant bail very readily; and whenever the offence is a small one, and the day of trial is distant, to accept the recognizances of the accused himself without any sureties.

It will further be the duty of the justices to transmit to the court where the trial is to take place the depositions of the witnesses and the prisoner's statement; of which we have already spoken[5]. The depositions are important for several purposes. (*a*) They enable the opposite party to check the evidence given at the trial, and to cross-examine or contradict a witness whose evidence there varies from that

[1] *Reg.* v. *Butler*, 14 Cox 530. All arrangements, between a person bailed and his sureties, that he shall abscond and shall indemnify them for the bail thereby forfeited, are so contrary to public policy that they are void as agreements (Anson on Contracts, ch. v. 1. ii.; *Herman* v. *Jeuchner*, L. R. 15 Q. B. D. 561; *Lound* v. *Grimwade*, L. R. 39 Ch. D. 605); and moreover are indictable as conspiracies to pervert the course of justice, if intention to pervert it be proved, (*Rex* v. *Stockwell*, 66 J. P. 376).

[2] Hence bail is less readily granted during a preliminary inquiry, when the depositions have not yet been completed, than after its conclusion. During the preliminary inquiry a magistrate has power to remand the accused in custody for a period not exceeding eight days, by warrant, and for three days, by a verbal order (11 and 12 Vict. c. 42, s. 21).

[3] About one person in every five committed is admitted to bail; and yet there is only one failure to about every four thousand committals.

[4] The need of such injunctions is vividly shewn by the fact that in the statistical year 1905, no fewer than 1605 persons who had been sent to prison to await indictment were ultimately acquitted.

[5] Moreover, committing justices may now, by 3 Edw. VII. c. 38 (*infra*, p. 513), provide legal aid, at the public cost, for any *poor* prisoner whose defence is so complex that he needs legal aid.

which he gave at the commitment. (*b*) They form a substitute[1] for the witness in the event of his being, at the time of the trial, either dead or too ill to travel[2] or to give evidence[3]. But his absence abroad does not suffice to render them admissible[4]. (*c*) They assist the draftsman who has to frame the indictment. (*d*) They enable the judge to learn the difficulties of the case before he charges the grand jury. And (*e*) they inform the defendant as to the precise case which he has to meet[5]. To him this is obviously an advantage; and it is often an advantage to the public, for if the case thus disclosed be a strong one, the defendant is the more likely to plead guilty. It is, however, to be regretted that our law does not take some measures for securing a reciprocal disclosure of the intended defence[6]. At present it is too easy for him to raise at the trial some speculative defence, which there is then no opportunity of contradicting, and to support it by witnesses about whom it is too late to make inquiries. The facility has become greater now that the prisoner himself is allowed to come forward as a witness.

The committing justice will conclude the inquiry by binding over (1) the necessary witnesses to appear at the

[1] Being a legally-required official record they are the "best evidence" (*supra*, p. 359) of what passed at the committal; and cannot be altered by oral evidence. Indeed oral evidence is probably not admissible even merely to supplement their omissions, when they are used as "substantive evidence," (*i.e.*, as a substitute for an absent witness), though it is when they are used to contradict a witness who does appear (Roscoe's *Criminal Evidence*, p. 58).

[2] 11 and 12 Vict. c. 42, s. 17.

[3] *Reg.* v. *Wicker*, 18 Jur. 252.

[4] Except by consent, in cases of misdemeanor; *supra*, p. 342; cf. p. 408.

[5] Hence *he* has a statutory right to purchase copies of them at 1½*d.* per ninety words (11 and 12 Vict. c. 42, s. 27). But the witness has no such right; and indeed ought not to be supplied with a copy.

[6] As was said by Jessel, M.R., in *Benbow* v. *Low* (L. R. 16 Ch. D. 95):—"If you give one party the opportunity of knowing the particulars of the evidence that is to be brought against him, you give a rogue an enormous advantage." Hence in civil proceedings, though the defendant is entitled to know the nature of the claim against him, he is not entitled to know by what evidence it will be supported; (Rules of the Supreme Court, Order 19, rule 4; *Marriott* v. *Chamberlain*, L. R. 17 Q. B. D. 154).

trial and (2) some person (usually a police constable) to prosecute, *i.e.*, to prefer a bill of indictment before the grand jury. He may commit to prison anyone who refuses to be thus bound over to give evidence or to prosecute[1]. Witnesses and prosecutors are only bound over in their own recognizances; though defendants, as we have seen, are usually required to find one or two sureties also. "A recognizance," says Blackstone[2], "is an obligation of record, which a man enters into before some court of record, or magistrate duly authorised, with condition to do some particular act, as, to keep the peace." Although the magistrate's court is not a court of record, yet its records are, in this respect, on the same footing as those of the higher courts[3]. It is a contract not by parol nor by deed, but of record[4]; since the record of the court is conclusive evidence as to its existence and terms, and indeed is the only evidence of them. For the party bound does not sign anything; he merely assents orally to the court's oral question. His assent consists in an admission of his owing to the Crown some specified sum of money to be payable unless a specified condition be fulfilled; *e.g.*, unless he (or, unless the defendant) appear at the next Assizes. Unlike other contracts (which have to be sued upon) recognizances admit of direct enforcement. For, if the condition be not fulfilled, the recognizance may at once be "estreated"; *i.e.*, an extract (Norman-French, *estrait*) shewing the terms of the obligation is copied from the court's record, and is sent to the clerk of the peace, who thereupon directs the sheriff to levy the amount upon the defendant's goods[5].

Finally the court may, in fit cases, assign to the accused a solicitor and a counsel, under the Poor Prisoners' Defence Act 1903[6].

[1] *Bennett* v. *Watson*, 3 Maule and Sel. 1.

[2] 4 Bl. Comm. 341. [3] See Brooke's Abridgement, tit. *Recognizance*; pl. 3.

[4] Anson on Contracts, part II. ch. II.; Chitty on Contracts, ch. I. s. 2.

[5] 3 Geo. IV. c. 46, s. 2. See *Reg.* v. *Smith*, 17 Cox 601, as to the difficulty of effectually binding an infant by recognizances, because of his incapacity to contract. [6] *Infra*, p. 513.

CHAPTER XXXI.

ORDINARY PROCEDURE.

II. From Accusation to Sentence.

4. *Prosecution.*

The process of commitment by a justice of the peace which we have described, though in actual practice it is adopted in almost every instance, is not legally essential[1] for bringing an accused person to trial before a jury[2]; (except in the few crimes to which the Vexatious Indictments Act[3] applies). All that is usually essential is some mode of "Prosecution," *i.e.*, of formal accusation. Such an accusation may be made either (1) by a crown official's Information, or (2) by a jury's Presentment.

(1) An *Information* is a written complaint made on behalf of the Crown by one of its officers and filed in the King's Bench Division[4]. Since such a mode of accusation dispenses with any accusing jury, and with any examination before a justice of the peace, it is only allowed in cases of

[1] Yet very important; for though, without any preliminary examination, a prosecutor may (in nearly all cases) place a bill of indictment before a grand jury, there is no legal machinery by which witnesses can be compelled to appear before the grand jury to support the accusation, where they have not been bound over by a committing justice to appear and to give evidence.

[2] Thus occasionally when a coroner's inquest has occupied an unusually protracted time, the magisterial inquiry is omitted; as in the case of Paine (*The Times*, Feb. 25, 1880), who was tried for a remarkable manslaughter (by plying with intoxicating liquor) without being taken before a magistrate, the coroner's inquest having lasted five days.

[3] *Infra*, p. 464.

[4] In 1899 only three were filed.

misdemeanor[1]. The Attorney-General has the right, *ex officio*, to file informations at his own discretion, but it has become practically obsolete[2]. The other official who can file them is the Master of the Crown Office; but he can only do it after obtaining an express permission from the King's Bench Division, and such permission is rarely asked for except at the instance of some private prosecutor. It is never granted unless the misdemeanor is of a peculiarly pernicious character. Thus it has been lately settled[3] that informations are not to be filed for libels unless the prosecutor has been attacked in some official capacity, or the attack has been couched in outrageous terms.

(2) A *Presentment*[4] is a written accusation of crime presented on oath by a coroner's jury[5] or a grand jury. If the accusation has been laid before the grand jury by some prosecutor, their presentment then obtains also the more specific name of an *Indictment*. In modern practice, almost every case that comes to a petit jury for trial comes on Indictment. The grand jury consequently plays so prominent a part in our procedure as to require some explanation of its history.

That history has usually been considered to date back so far as A.D. 997; when Ethelred the Unready enacted the Law of Woodstock: "Let a moot be held in every Wapentake; and let the twelve senior thegns go out, and the reeve with

[1] But in early days it seems to have been allowed in treason and felony also; (Pollock and Maitland, II. 658).

[2] In consequence of the hostility aroused by the great number of *ex officio* informations filed by Sir James Scarlett when Attorney-General under the Duke of Wellington's administration of 1828–30.

[3] *Reg.* v. *Labouchere*, L. R. 12 Q. B. D. 320.

[4] 4 Bl. Comm. 298. The term is also often used in a narrower sense, in which it is limited to cases where a grand jury speaks from its own personal knowledge, (*e.g.*, accusing persons who are responsible for the obvious non-repair of some well-known highway). Such presentments are now-a-days extremely rare. They are, however, interesting as survivals of the grand jury's ancient function of *initiating* accusations.

[5] *Supra*, p. 426.

them; and let them swear on a relic that they will accuse no innocent man nor conceal any guilty one[1]." But the most recent authorities[2] doubt both the permanence and the generality of this law; and consider the consecutive history of our modern grand juries to go back only as far as A.D. 1166. In that year Henry II. prescribed, in the Assize of Clarendon, a very similar procedure; probably taking it, not from the Anglo-Saxon precedents, but from the Frankish inquests, as adopted in Normandy. The ordinance of Henry II. required twelve knights, or other freemen, of every hundred, and four men (who would probably be *un*free) of every township, to send in accusations of murder, robbery, larceny, and harbouring of criminals. In 1176 arson and forgery were added[3].

At the present day a grand jury may consist of any number of persons from twelve to twenty-three, but twelve must agree upon any presentment[4]. There is no property qualification for grand jurors at Assizes or at the Quarter Sessions of boroughs[5]. But at the Quarter Sessions of counties a grand juryman must have the same qualification as is required for petty jurymen at Assizes or Sessions (and for civil common jurymen); viz., he must own a freehold of the value of £10 a year, or be a leaseholder, for a term of at least twenty-one years, of lands of the value of £20 a year, or occupy a house rated at not less than £20 (or in Middlesex, £30)[6].

The grand jury was, as we have seen, established in order to multiply accusations of crime. By a curious inversion its

[1] Stubbs' *Select Charters*, part II.; *Constit. History*, I. 611.

[2] Pollock and Maitland, I. 121; II. 640—648.

[3] Stubbs' *Select Charters*, part IV. These ordinances came to fix a line between felonies and mere "trespasses," *i.e.*, misdemeanors; (*supra*, p. 98).

[4] Cf. the similar rule which applies in the court of the Lord High Steward (*supra*, p. 419); and to juries on lunacy inquiries (53 and 54 Vict. c. 5, s. 97), and at coroners' inquests (50 and 51 Vict. c. 71, s. 3). Even on the petit jury, unanimity was not required until 41 Edw. III.; (Pollock and Maitland, II. 623).

[5] 45 and 46 Vict. c. 50, s. 186 (1).

[6] 6 Geo. IV. c. 50.

present function is that of revising, and thereby diminishing, such accusations[1]; though the old form of oath remains, viz., "You shall present all matters touching your present service that may come to your knowledge." The grand jury hear the witnesses for the prosecution (or so many of them as they desire). But no counsel are present to conduct the examination; or to guard against the possibility of the bill's being ignored through some misapprehension of law. It is not usual to allow the grand jury to have the depositions before them; and the examination takes place in private, without a note of it being made beyond the mere name of each witness examined, and all the grand jurors are under an oath of secrecy. There is thus little check upon any untruthful witness. Moreover the grand jury never see either the defendant or his witnesses. Thus the sole function of a modern grand jury is to repeat badly what has already been done well:—to hear in secret, imperfectly, and in the absence of the accused, one side of the case[2], after both sides of it have already been heard fully, in open court, and with full opportunity of legal aid. A bad tribunal is laboriously[3] brought together, in order to revise the work of a better one[4].

[1] Yet the rejection of an accusation by the grand jury is not equivalent to an acquittal; so the same bill may subsequently be presented to another grand jury. *E.g.*, in a recent case of *Rex* v. *Price* the grand jury at Assizes found a true bill after a similar one had been ignored by the grand jury at Quarter Sessions; (*The Times*, March 1, 1901).

[2] Of the bills laid before them, grand juries ignore from two to three per cent. But the inquiries made in 1859 by the Lord Chancellor (Lord Chelmsford) led him to the conclusion that even at the Central Criminal Court more than half the bills ignored ought to have been tried. See his speech in support of his Bill for the abolition of grand juries in London; (Hansard, March 10, 1859).

[3] Happily not always so laboriously as in Norfolk, where it was usual at each Assize to summon as many as two hundred persons from whom to take the grand jury, (*i.e.* all the county magistrates), till June, 1902.

[4] Those who still defend the retention of the grand jury system rely chiefly upon the following arguments. (1) That it affords the country gentry some useful legal experience; and by obtaining their presence adds to the

The written accusation laid before a grand jury is called a "bill of indictment[1]." If, instead of "ignoring" it, they find it a "true bill," it then becomes an "Indictment." An indictment is defined by Sir Matthew Hale as "a plain, brief, and certain narrative of an offence committed[2]." It consists of three parts:—(1) the commencement; (2) the statement; (3) the conclusion. (For examples, see p. 514 *infra.*)

(1) The *commencement*, after setting out the venue in the margin, usually continues:—"The jurors for our Lord the King upon their oath present that...." The venue states the place of the court's jurisdiction; usually a particular

dignity of the court. (2) That the grand jury, being more independent of the Crown than a justice (or at any rate a stipendiary magistrate) is, will be more prompt to dismiss any groundless prosecutions for political offences. (3) That a more emphatic assurance of innocence is afforded if an accusation is ignored before anything beyond the accuser's own side of the case has been heard. This third argument (which at the present day is perhaps the only one that calls for consideration) surely goes too far in assuming that innocence is more clearly demonstrated by acquittal upon a secret and imperfect hearing of the prosecution, than by acquittal upon a perfect hearing of both sides. As Lord Denman is reported to have said, "If the grand jury agree with the committing magistrate, they are useless; if they differ from him, they may be defeating justice irreparably, and yet they are not clearing the character of the accused effectually." De Franqueville pronounces the grand jury "tout au moins inutile," (I. 357); Sir Henry Maine thought it "secret, one-sided, irresponsible...an obstruction to justice," (*Speeches*, pp. 184, 191). In Scotland no grand jury exists, except in Treason; and there appears to be no desire for its establishment. A Scottish indictment is (Macdonald's *Criminal Law*, pp. 274, 282) an accusation by the Lord Advocate or the Procurator-Fiscal.

[1] This is usually drawn on circuits and at the Central Criminal Court by the Clerk of Assize, or of Arraigns, or by the Clerk of Indictments; at Quarter Sessions, by the Clerk of the Peace. See forms, *supra* p. xxviii.

[2] 2 Hale P. C. 169. Yet in charges of treason, conspiracy, or fraud, indictments are frequently of remarkable length. Thus the indictment in *O'Connell's Case*, in 1844 (5 St. Tr., N. S., 1) was a hundred yards long; when made into book shape it filled fifty-seven pages, the size of a page of *The Times*. One indictment for conspiracy to defraud tried at the Central Criminal Court in 1890 (CXI. 602) contained sixty-nine counts, and another tried at Croydon Assizes in January, 1902, contained forty-five.

county or borough. For, as a general rule, an offence can only be tried by the court within whose jurisdiction it (or a part of it[1]) was committed. Thus on an indictment for sending a libellous letter the venue may be either where it was posted or where it was received; and in larceny the venue may be in any county where the accused has had the goods in his possession for any moment of time. Moreover, by statute[2], the venue may now be laid in any county within five hundred yards of which,—or on a river constituting the boundary of which,—the crime was committed.

(2) The *Statement* constitutes the main body of the indictment. It consists of one or more clauses, or "counts"; each of which purports to embody a separate accusation. Each count is, practically, a separate indictment, and may form the subject of a separate trial. Every count, therefore, must describe with particularity the offence with which it charges the accused—specifying the date, circumstances, and intention—so that he (*a*) may know what defence to offer, and (*b*) may be able to produce it as evidence that the charge has already been dealt with, should he ever happen to be prosecuted for the same transaction a second time. Hence if a count be not detailed enough, but too "general," the judge may quash it; for "generality of accusation is difficulty of defence." Thus counts which allege "a corrupt practice at [a specified] election[3]," or the act of "inciting *A* to commit a criminal indictable offence," or of "attempting to induce *A* to contravene the law of the land[4]," but do not specify what the particular practice, or offence, or contravention was, are too general. And no count may run in the alternative[5].

At common law, the degree of precision required in the statement was curiously minute[6]. But at the present day

[1] 7 Geo. IV. c. 64, s. 12. [2] *Ibid.* ss. 12, 13.
[3] *Reg.* v. *Stroulger*, L. R. 17 Q. B. D. 382.
[4] C. C. C. Sess. Pap. XCIII. 207. [5] *E.g.*, not "neglect *or* expose" a child.
[6] Thus, in 1829, under a statute which prohibited the stealing of "rams,

courts hold, as the late Lord Russell grimly said, that "even in considering the question of the validity of an indictment, one must have some regard to the ordinary interpretation of language[1]." Accordingly the rule, or supposed rule, of favouring accused persons by construing penal statutes strictly[2] is not applied to indictments. An indictment, like any ordinary document[3], must be so construed *ut res magis valeat quam pereat*. Thus, if its words be capable of different meanings, it must be construed "in that sense in which the party framing the indictment must have used it if he intended his charge to be consistent with itself[4]"; that is to say, in the sense most favourable to the prosecutor. And, as in ordinary instruments, surplus words may be rejected: *utile per inutile non vitiatur*. Should two entire clauses be contradictory, so that one of them must be rejected as surplusage, it is, as in deeds, the later one that must be so rejected[5], (not, as in wills, the earlier).

The circumstances of the offence which it is always necessary for a count to specify[6], include (i) the party

ewes or sheep," one Puddifoot was indicted for stealing a *sheep*. The evidence being that he stole an *ewe*, the conviction was held wrong (1 Moody 247); a decision which recalls some of the subtleties of the Roman legis actiones: which might fail if vines were described as "vites" instead of as "arbores"—the word used in the Twelve Tables. An equally striking instance is *Rex* v. *Woolcock*, 5 C. and P. 516.

[1] *Reg.* v. *Jameson*, L. R. [1896] 2 Q. B. at p. 429.

[2] Broom's *Legal Maxims*, p. 550.

[3] Anson on Contracts, part IV. ch. II. s. 1.

[4] *Rex* v. *Stevens*, 5 East, at p. 257.

[5] *Wyatt* v. *Aland*, Salk. 325. Cf. 2 Bl. Comm. 381.

[6] If however, at the trial, the evidence should vary from the statements of the indictment as to the mere "name or description of any place, or of any matter or thing, or of any of the parties, or of the ownership of any property referred to," the court is now permitted by statute to amend the indictment, "if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, on such merits" (14 and 15 Vict. c. 100, s. 1).

indicted; (ii) the party injured; and (iii) the facts and intent that are necessary ingredients of the offence[1].

(i) The party indicted should be described by both Christian name and surname. Yet if the defendant's name is unknown, and he refuses to disclose it, he may be indicted as "a person whose name is unknown, but who was personally brought before the jurors by the keeper of the prison[2]."

(ii) Similarly the names of the party injured should be stated[3]. But if this be impossible he too may be described as "a person unknown"; as in the case of the murder of some stranger found dead.

(iii) The acts, circumstances[4], and intent constituting the offence must be set out with certainty. In some offences the due degree of legal certainty can only be obtained by employing some particular technical expressions. Thus the intent must be described in indictments for any treason by saying "traitorously"; for any felony, "feloniously"; for murder, "feloniously and of malice aforethought"; for burglary, "feloniously and burglariously"; for robbery, "feloniously and against the will of the said *A*"; for piracy, "feloniously and piratically." Similarly the act must be described in indictments for murder by saying, "did murder"; for rape, "did ravish"; for larceny, "did steal, take, and carry away[5]."

[1] Not now the *time*, unless time be (as in burglary) of the essence of the offence (14 and 15 Vict. c. 100, s. 24).

[2] *Rex* v. ———, R. and R. 489.

[3] 2 Hawkins P. C. c. 25, ss. 71, 72.

[4] Formerly in all indictments for murder or manslaughter, the manner in which death was caused had to be described with particularity; but this now is no longer necessary (24 and 25 Vict. c. 100, s. 6).

[5] The forms usually employed are still fuller. The indictment in murder ordinarily runs :—"...feloniously, wilfully, and of his malice aforethought did kill and murder." In burglary it runs :—"...feloniously and burglariously did break and enter the dwelling-house...with intent feloniously and burglariously to steal, take and carry away." (See Archbold's *Criminal Pleading*, p. 746, and p. 591.)

A count must never be "double"; that is to say, must not include two separate offences. Yet the whole of any *single* transaction, however complex, may be comprised in one count; *e.g.*, when *A*, *B*, *C* and *D* have set upon *E* and *F* together, and robbed them[1]. And in early days no indictment could contain more than one count. This simplicity of statement made inevitable a miscarriage of justice, if the facts proved at the trial happened to deviate even slightly from those alleged in the indictment. To avoid this danger, a plurality of counts was soon allowed, describing the same crime in many forms, as if there had been so many distinct occurrences[2].

Modern practice indeed permits even entirely different transactions to be charged in the same indictment, in different counts. But (*a*) a court may in its discretion quash any indictment as embarrassing; *e.g.*, if it includes a larger number of charges than can be conveniently dealt with at one trial. And (*b*), as the forms of procedure at a trial differ according as it is for a treason or a felony or a misdemeanor, an indictment must not include charges that belong to more than one of these three grades. Moreover, in the case of felonies, it is found so undesirable to exercise this right of including separate transactions in one indictment, that (unless the separate felonies constitute substantially a single transaction[3]) the court usually directs the prosecutor to elect one

[1] *Reg.* v. *Giddins*, C. and M. 634. Compare, as to the alternative possibility of subdividing a transaction into separate counts, *Reg.* v. *Brettell*, C. and M. 609.

[2] Thus in *Reg.* v. *Daniel Good* (C. C. C. Sess. Pap. XVI. 233), a case of murder where only the headless trunk of the victim was found, there were thirty-five counts alleging different modes of death. This, however, was in 1842, before 14 and 15 Vict. c. 100, s. 6 had (*supra*, p. 460) made it unnecessary to specify the cause of death.

[3] Thus where a man who had wounded nine cows in the same stable at the same time, was charged with these offences in one indictment, in nine different counts, the judge refused to interfere; since, as it all was one transaction, the prisoner was not embarrassed in his defence. 6 St. Tr. (N. S.) 726.

count, and proceed upon it alone. But by statute no such direction is to be given when this plurality of felonies consists of not more than three larcenies[1], or three embezzlements[2], all of which have been committed by the same offender, against the same prosecutor, within a period, from the first act to the third, of six months.

(3) Indictments usually terminate with a clause technically known as the "conclusion." In common-law offences this consists of the words:—"against the peace of our Lord the King, his crown and dignity." But in statutory offences the further words "against the form of the statute in such case made and provided, and..." are inserted before the common-law formula. A conclusion, however, is no longer essential to the validity of an indictment[3].

As a general rule the evidence must of course establish, and the conviction must be for, the actual offence stated in the count to which it relates[4]. But, even by common law, "averments are divisible"; so that if the words in which a count states an offence involve the statement of some minor offence, the petty jury can reject part of the averment and convict of the minor offence alone, though it was not stated separately[5]. Thus a statement of murder becomes a statement of manslaughter if the words "of malice aforethought" be omitted[6]; whilst similarly every statement of aggravated larceny includes one of simple larceny. And the legislature has gone still further, in two ways. For (1) in some cases it has enabled juries to convict of the crime which

[1] 24 and 25 Vict. c. 96, s. 5. [2] *Ibid.* s. 71.

[3] 14 and 15 Vict. c. 100, s. 24.

[4] For the (very limited) powers of amendment which the court possesses, see p. 459 *supra*.

[5] 2 Hale P. C. 191, 192. Provided of course that both offences are of the same grade; *i.e.*, both are treasons, or are felonies, or are misdemeanors.

[6] *Rex* v. *Mackalley*, 9 Coke Rep. 67 b.

has in fact been proved, although it is not the crime charged in the indictment. Thus on an indictment for any crime the jury may convict of an attempt to commit it[1]; and on one for robbery, of an assault with intent to rob[2]; on one for embezzlement, of either larceny as a servant or simple larceny; on one for larceny, of embezzlement[3]; on one for murder, of concealment of birth[4]; and on one for rape, or any offence which is made a felony by section 4 of the Criminal Law Amendment Act, 1885[5] (*e.g.*, having carnal knowledge of a girl under thirteen), the jury may instead convict of an indecent assault, or of procuring connexion by threats or by false pretences, or of having carnal knowledge of a girl under sixteen[6]. (2) Again, the legislature has in other cases permitted juries to convict of the crime alleged in an indictment, even though a different (but a graver one) has been proved by the evidence. Thus, on an indictment for misdemeanor, if the facts given in evidence prove not only the constituents of the crime alleged, but further elements which constitute some felony in which it has been merged, the prisoner may still be convicted of the misdemeanor[7], notwithstanding its merger; as when a person is indicted for obtaining goods by false pretences, and the false pretence proves to have constituted a felonious forgery. Again, if, on an indictment for obtaining by false pretences,

[1] 14 and 15 Vict. c. 100, s. 9. Yet the crime may be a felony, whilst the attempt is only a misdemeanor.

[2] 24 and 25 Vict. c. 96, s. 41.

[3] 24 and 25 Vict. c. 96, s. 72.

[4] 24 and 25 Vict. c. 100, s. 60.

[5] 48 and 49 Vict. c. 69, s. 9.

[6] *I.e.* where the girl, instead of being under thirteen, is found to be between thirteen and sixteen. By the Prevention of Cruelty to Children Act 1904, (4 Edw. 7, c. 15) on an indictment for the manslaughter of a child by neglect, the jury may instead convict of any of the numerous offences of cruelty set out in the Act. Hence any such indictment will involve several distinct issues.

[7] 14 and 15 Vict. c. 100, s. 12. Cf. 3 C. and K. 200.

the defendant is proved to have obtained the property by means amounting to larceny, he may be convicted as indicted[1]. But the converse does not hold; and therefore a prosecutor who is in doubt as to which of these two offences has been committed, will always find it safer to indict for false pretences than for larceny[2]. A third statutory provision of this kind is that an accessory before the fact to any felony may be indicted, tried, convicted, and punished as if he were a principal felon[3].

At common law any person may prefer a bill of indictment to a grand jury, without even giving notice to the person accused; so that the latter may never know anything of it until the grand jury have actually found an indictment against him, and even then know nothing more of the case he has to meet than the bare outline which the indictment affords him. In practice, indeed, bills are rarely presented to the grand jury until after a preliminary inquiry before a justice. But the common-law liberty of indictment makes it possible for innocent persons to be subjected to great anxiety and expense by groundless prosecutions instituted from spite or in the hope of extorting money. Yet the only remedy of such a person is the costly and uncertain one of an action for malicious prosecution[4]. Hence the legislature has restricted[5] the power of prosecution in the case of those crimes which experience shewed to be most frequently made the subject of false accusations. Restriction is imposed by the Vexatious Indictments Act, 1859[6], in cases of (1) perjury

[1] 24 and 25 Vict. c. 96, s. 88.

[2] *Reg.* v. *Solomons*, 17 Cox 93. See also *Cundy* v. *Lindsay*, L. R. 3 A. C. 459. [3] 24 and 25 Vict. c. 94, s. 1. [4] Pollock on Torts, ch. VIII.

[5] Though a great lawyer, Lord Wensleydale, pronounced all such restrictions to be "highly objectionable and unconstitutional" (Hansard, March 1, 1859).

[6] 22 and 23 Vict. c. 17. Cf. the Vexatious *Actions* Act, 1896.

and subornation of perjury; (2) conspiracy; (3) obtaining by false pretences; (4) indecent assault; and (5) keeping a gambling house or a disorderly house. And by subsequent statutes, in cases of (6) misdemeanors under the Debtors' Act, 1869[1]; (7) libel[2]; (8) misdemeanors under the Criminal Law Amendment Act, 1885[3]; and (9) all offences punishable on indictment under the Merchandise Marks Act, 1887[4]; and (10) under the Prevention of Corruption Act 1906 (6 Edw. 7, c. 34). In these ten cases no bill is to go to a grand jury unless either

(i) the prosecution has been directed by a judge[5]; or by the Attorney-general or Solicitor-general, or, in the case of perjury, by some other official having power[6] to make such accusation;

or (ii) the accused has been committed for trial, in the ordinary way, by a justice of the peace;

or (iii) the prosecutor has been bound over by a justice of the peace, in recognizances, to prosecute forthwith. When, on a preliminary examination for any of the offences we are now considering, the justice refuses to send the case for trial, the prosecutor can demand to be thus bound over to prosecute[7], and so still take the case to a grand jury. But he does it at the risk of being ordered, in case of acquittal, to pay the costs of the accused and of his witnesses[8].

[1] 32 and 33 Vict. c. 62, s. 18.

[2] 44 and 45 Vict. c. 60, s. 6. But upon any prosecution of the publisher of a *newspaper* for libel, the check is still closer; for the only way of commencing it is by obtaining the order of a judge (51 and 52 Vict. c. 64, s. 8).

[3] 48 and 49 Vict. c. 69, s. 17.

[4] 50 and 51 Vict. c. 28, s. 13.

[5] Only one such prosecution has taken place at the Central Criminal Court in thirty-five years.

[6] By virtue of 14 and 15 Vict. c. 100.

[7] 22 and 23 Vict. c. 17, s. 2. See *Reg.* v. *Lord Mayor of London*, 16 Cox 77. It is noteworthy that, in several cases at the Central Criminal Court, juries ultimately have convicted where a justice had thus refused to commit.

[8] 30 and 31 Vict. c. 35, s. 2.

5. *Arraignment.*

In a criminal prosecution the defendant must personally appear at the bar of the court in order to be "arraigned," *i.e.*, called to a reckoning (*ad rationem*) by hearing the indictment read, and to plead to it. (The only exception is that, if the trial be in the King's Bench Division and be merely for misdemeanor, the defendant may, by leave of the court, appear by attorney[1].) As a general rule, too, the defendant must remain in court during all the proceedings[2]. But in cases of mere misdemeanors the Court may[3] give him leave of absence so soon as he has pleaded[4].

6. *Plea and issue.*

When the indictment has been read[5] to him he has several courses open. He may either (1) confess; or (2) stand mute; or (3) take some legal objection to the indictment; or (4) plead to it.

[1] Hence corporations, as we have seen (*supra*, p. 62), since they were incapable of appearing in person, were originally outside the criminal law; and they were first rendered amenable to it by their prosecutions being removed into the King's Bench Division, as there the practice permitted appearance by attorney. They are now allowed so to appear at Assizes also (Crown Office Rules, 1886, r. 29); though they still cannot be indicted at Quarter Sessions, for to these courts the ancient statute (3 Edw. I. c. 10) sanctioning appearance by attorneys does not extend. But they may appear by attorney before Petty Sessions, as s. 49 of the Summary Jurisdiction Act, 1879, expressly includes bodies corporate. In the case of a joint stock company, service of the summons must be made—not with the freedom usually allowed by the Summary Jurisdiction Acts, but—at the registered office of the company, under s. 62 of the Companies Act, 1862 (25 and 26 Vict. c. 72); *Pearks* v. *Richardson*, L. R. [1902] 1 K. B. 91.

[2] *Reg.* v. *St George*, 9 C. and P. 483.

[3] Eighth Report of the Criminal Law Commissioners, p. 143.

[4] Thus the Tichborne claimant was absent on a few of the 188 days of his trial for perjury.

[5] In misdemeanors, he is entitled by common law to buy a copy of the indictment; and in treasons, by statute (7 and 8 Wm. III. c. 3, s. 1). But in felonies, his strict right is only to have it read over to him; *Reg.* v. *Dowling*, 3 Cox 509.

(1) If he confesses, *i.e.*, "pleads guilty[1]" he may be at once sentenced. But in serious cases, lest he should be confessing under some misapprehension as to the law or even the facts of his case, the court usually advises him to withdraw his plea of guilty, and so let the matter be fully investigated[2].

(2) If he "stands mute," *i.e.*, says nothing at all, a jury must be impanelled to try whether he is thus mute "of malice," or "by the visitation of God." In the latter case, the question will arise whether or not he can be made to understand by signs. But if he is mute merely from malice, a plea of not guilty will at once be entered[3]. In treason and misdemeanor, standing mute used at common law to amount, on the other hand, to a confession of guilt. But in felony the matter was less simple. It was preferred to try him; yet he could not be tried without his own consent. To extort that consent he was (until 12 Geo. III. c. 20) subjected to the *peine forte et dure*, by being laid under a heavy mass of iron, and deprived almost entirely of food. Many prisoners deliberately preferred to die under this torture rather than be tried; because, by dying unconvicted, they saved their families from that forfeiture of property which a conviction would have brought about[4].

(3) He may shew that the indictment is, on the face of it, open to some legal objection; *e.g.*, that a count is too general in its language, or that the court has no jurisdiction to try the offence[5]. Legal objections may be raised by

[1] Very nearly half of the prisoners indicted at Assizes or Quarter Sessions plead guilty (*Judicial Criminal Statistics*: issue of 1900, p. 45).

[2] In the remarkable case, however, of Constance Kent, who pleaded guilty in 1865 to the Road murder of 1860, Willes, J., at once pronounced sentence of death (*The Times*, July 22, 1865).

[3] 7 and 8 Geo. IV. c. 28, s. 2. For a recent instance of a verdict of mute of malice, see *The Times*, Feb. 26, 1901.

[4] The memorable John Gerbage (*supra*, p. 265) thus avoided forfeiture (Y. B. 21 Edw. III. 23).

[5] *Rex* v. *Bainton*, 2 Strange 1088.

a demurrer, or (which for technical reasons is the far more common course) by a motion to quash the indictment.

(4) He may put in a "plea" to the indictment. The most important pleas are:—

i. A plea to the Jurisdiction. This plea is rarely made. For an objection to the jurisdiction of the particular court, (as when a man is indicted at the Quarter Sessions for perjury), being a legal objection, may also be raised in the manner just now explained. And if the offence is one over which no English court at all has jurisdiction (*e.g.*, an offence committed on board a foreign ship on the high seas), this defence can clearly be raised not only as a legal objection but even under "Not guilty[1]."

ii. A plea in Abatement; *i.e.*, an objection alleging some fact which shews that there is in the indictment some error of form, as when a peer is arraigned before Assizes or Quarter Sessions. Such pleas, however, have been rendered obsolete by the powers now given to the courts to amend indictments[2].

iii. A general plea in Bar. A plea in bar means a substantial defence; and a *general* plea in bar raises the "general issue," and traverses (*i.e.*, denies) the whole indictment, by alleging that the defendant is "Not guilty."

iv. A special plea in Bar[3]. These are extremely rare, as almost any matter of defence can be raised under "Not Guilty." The only ones which require any notice are:—

(*a*) That of Justification, in cases of libel; where the

[1] *Rex* v. *Johnson*, 6 East 583. Cf. *Reg.* v. *Jameson*, L. R. [1896] 2 Q. B. 425. [2] 7 Geo. IV. c. 64, s. 19; 14 and 15 Vict. c. 100, s. 24.

[3] To any special plea the Crown may put in either a "demurrer" on grounds of law, or a "special replication" on grounds of fact, *e.g.*, to a plea of "autrefois acquit" the Crown may reply "not acquit of arson but only of murder by arson"; (*Reg.* v. *Serné*, C. C. C. Sess. Pap. CVII. 418; *supra*, p. 186).

defendant pleads, under Lord Campbell's Act[1], that the matter charged as libellous is true, and that it was for the public benefit that it should be published. But on this plea costs may be given against the defendant if he fails to establish it. Along with this defence he may (contrary to the general rule)[2] plead at the same time "Not guilty."

(β) A Pardon from the Crown.

(γ) Autrefois acquit; and (δ) Autrefois convict. The general principle of common law is *Nemo debet bis vexari*—a man must not be put twice in peril for the same offence. Hence, if he be indicted again, he can plead as a complete defence his former acquittal or conviction[3]. Even though it were in a foreign country that the acquittal or conviction took place, it will none the less constitute a defence in our courts[4]. To determine in any particular case whether such a plea is available, it is necessary to ask:—(1) Was the prisoner "in jeopardy" on the first indictment? (2) Was there a final verdict? (3) Was the previous charge substantially the same as the present one?

(1) A prisoner cannot have been in jeopardy[5] if the indictment was legally invalid; for no conviction upon it would have been effectual[6]. If therefore he defeats it by some plea to the jurisdiction, (*e.g.*, where he has been in-

[1] 6 and 7 Vict. c. 96; *supra*, p. 311. Such a plea may shew vividly how peculiar to prisoners is the privilege of tendering evidence of good character (*supra*, p. 390). If *A*, being indicted for libellously accusing *B* of theft, should plead the truth of the accusation, *B* (being not a prisoner but a prosecutor) cannot call evidence of his own good character to disprove its truth; though he could do so, if he were *indicted* for the theft.

[2] *Reg.* v. *Strahan*, 7 Cox 85.

[3] And a similar plea is allowed by statute (42 and 43 Vict. c. 49, s. 27) in cases where an indictable offence has been dealt with summarily, (the ordinary forms of plea being confined to acquittal or conviction by a jury). As to assaults, see also 24 and 25 Vict. c. 100, s. 44.

[4] *Rex* v. *Roche*, 1 Leach 134, (acquittal by Dutch court); *Rex* v. *Hutchinson*, 3 Mod. 194, (acquittal by Portuguese court).

[5] *Reg.* v. *Salvi*, 10 Cox 481.

[6] 4 Coke Rep. 44, 45.

dicted in the wrong county), or by getting it quashed, he will still remain liable to be again indicted on the same charge.

(2) It is necessary that a final verdict should actually have been given. If the petit jury were discharged without a verdict (*e.g.*, on account of their being unable to agree), this will no more prevent a second trial than would the fact of a former bill's having been ignored by the grand jury.

(3) To determine whether the two charges are "substantially[1]" identical is often a subtle problem. They are sufficiently nearly identical, if evidence of the facts alleged in the second indictment would legally have sufficed to procure some conviction on the first indictment[2]; whether it were a conviction for the offence actually charged in that first indictment, or even for some other, either of an equal[3] or of a lower[4] degree of heinousness. Hence the two indictments must refer to the same transaction[5]. Yet the intent or the circumstances alleged in the one may be more aggravated than those alleged in the other. Thus an acquittal (or similarly a conviction) for a common assault bars a subsequent indictment for an assault with intent to murder, or even for an unlawful wounding[6]; and an acquittal for man-

[1] *Rex* v. *Emden*, 9 East 437.

[2] *Rex* v. *Clark*, 1 B. and B. 473.

[3] *E.g.*, a conviction for larceny as a servant, on an indictment for embezzlement.

[4] *E.g.*, a conviction for manslaughter, on an indictment for murder.

[5] They may do this even though they have stated some of the immaterial circumstances in contradictory ways. Thus if *A* has been indicted for murdering *B* on Monday in one parish, and has been acquitted, he can plead *autrefois acquit* if he be subsequently indicted for murdering him on Tuesday in the adjoining parish, provided he can shew by evidence that, though the averments thus differ, the two charges relate to the same transaction.

[6] See *Reg.* v. *Grimwood*, 60 J. P. 809, where a man was indicted at the Hastings Quarter Sessions on four counts; the first three charging the infliction of grievous bodily harm etc., but the fourth merely a common

slaughter bars a subsequent indictment for murder[1], and *vice versâ*. On the other hand, an acquittal for unlawful wounding does not bar a subsequent indictment for murder; and an acquittal on an indictment for murdering *A* by burning a house in which he was asleep, does not bar a subsequent indictment for the arson of the house[2]. For in each of these two pairs of charges, the pair are so dissimilar that it would not have been legally possible to obtain a conviction upon the first indictment by the evidence necessary to support the charge made in the second one[3].

In misdemeanors, by a somewhat harsh rule, judgment on a plea of *autrefois acquit* or *convict* is final[4]: so that if the accused be defeated on it, he cannot proceed to establish his innocence, but must be sentenced. Yet in felony or treason he is allowed to "plead over," *i.e.*, to go on to put in a further plea of Not guilty.

7. *Trial and Verdict.*

"Justice," says Lord Bacon, "is sweetest when it is freshest." Hence, in grave cases, the Habeas Corpus Act[5]

assault. On the first three counts the jury disagreed, but they convicted him of the common assault. The Recorder remitted the prisoner to the Assizes, to be again tried on the first three counts. At the Assizes, however, the prisoner pleaded autrefois convict (by the verdict as to the common assault); and was accordingly discharged.

[1] 2 Hale P. C. 246. Similarly an acquittal for any crime bars a second indictment for an attempt to commit that crime, now that (by 14 and 15 Vict. c. 100, s. 9) a jury, on an indictment for any completed offence, can convict of a mere attempt. And, now that (by 24 and 25 Vict. c. 96, s. 72) a jury may convict of embezzlement upon an indictment for larceny—or *vice versâ*—an acquittal for either of these felonies bars a subsequent indictment for the other on the same facts.

[2] *Reg.* v. *Serné*, C. C. C. Sess. Pap. cvii. 418.

[3] By the same reasoning an acquittal or conviction for burglary with intent to commit larceny will not bar a subsequent indictment for the larceny; though, if the first indictment had charged an actual larceny, it would be otherwise.

[4] Archbold's *Criminal Pleading*, 22nd ed. p. 159.

[5] 31 Car. II. c. 2, s. 6.

makes definite provision to secure this freshness; by providing that if any man, who has been committed on a charge of either treason or felony, be not indicted at the next Assizes after his commitment, he must be released on bail[1]; and if at the next subsequent Assizes he be not both indicted and tried, he must be discharged altogether.

When a person indicted pleads *Not guilty* to the accusation he thereby "joins issue[2]" with the Crown. This issue must be decided by a Trial[3]. If the accused be a peer, and the accusation be either of treason or of felony, the trial will, as we have seen[4], take place before the peers of the United Kingdom. But in all other cases the indictment will be tried *per patriam*—by a petit jury composed of twelve representatives of his countrymen[5]. The history of such

[1] Unless the witnesses for the Crown cannot appear.

[2] The student will be on his guard against the current misuse of this expression, which treats it as meaning to *agree with* a debater's contention—the very opposite of its real meaning.

[3] Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence if any one who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as to his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects; (per Hawkins, J., in *Reg.* v. *Harris*, C. C. C. Sess. Pap. xcv. 525). The same principle applies to letters or other documents. Moreover every Crown witness must be named on the back of the bill presented to the grand jury that they may, if they like, call him. And every witness so named must be made to attend at the trial, in order that if the Crown do not call him, the prisoner may be able to do so. For the prosecuting counsel is not bound to call all his witnesses (2 C. and K. 520; C. C. C. Sess. Pap. xci. 83, 186; cii. 317), since the evidence of some of them may seem to him to be irrelevant or even untrustworthy. But should the prisoner elect to call a Crown witness who has been thus passed over, he thereby makes him his own witness; and the Crown can accordingly cross-examine the witness, and can reply on his evidence (*Reg.* v. *Cassidy*, 1 F. and F. 79).

[4] *Supra*, pp. 416—419.

[5] See Pollock and Maitland, i. 117, ii. 615; Stubbs' *Const. Hist.* i. s. 164; Stephen's *Hist. Cr. Law*, i. 254. "The most transcendent privilege which any subject can wish for is, that he cannot be affected in his property or liberty

trials is noteworthy. Originally, accusations made by the grand jury were tried by ordeal. After the abolition of ordeals in 1215, every accusation had to be referred back to the grand jury, sometimes with the addition of some further colleagues[1]. In the course of a century, it came to be the practice for these new jurors alone to undertake this duty of revision, without the presence of the original accusers; and at last the latter were definitely excluded by a statute of 1352. This produced our present double system of juries. But both juries proceeded upon common repute, or upon their personal knowledge; men who knew the circumstances of the crime being often put on as additional or "afforcing" jurors. About 1500, however, such persons ceased to be added to the jury itself, and instead were sent to give evidence before it. This differentiation of the functions of the witness from those of the juror was intensified, two centuries later, by allowing witnesses to be called expressly on behalf of the prisoner. Documentary evidence became common before that of witnesses[2]; and it seems probable that even the evidence of witnesses was at first usually received in a written form. At any rate the

or person but by the unanimous consent of twelve of his neighbours and his equals. This, for a long succession of ages, has secured the just liberties of this nation"; (3 Bl. Comm. 379). It is true that, as an instrument of accurate inquiry, the value of the jury may sometimes be small. In matters of complicated mercantile accounts, or in scientific disputes about a prisoner's insanity or the results of a poison, trial by a common jury would have little superiority over trial by Ordeal or by Compurgation, were it not for the guidance afforded in the judge's summing up. Hence in nearly half the civil cases in even the King's Bench Division (in those of London and Middlesex 62 per cent.) litigants now prefer to dispense with juries. But in criminal cases it is not so important that the verdict should be accurate as that it should be humane; to let some guilty men escape is a less evil than to punish any innocent man. Consequently, in all criminal accusations that are of any gravity, the protection afforded by trial by jury is a privilege worthy of the eulogium pronounced on it by Blackstone.

[1] Pollock and Maitland, II. 645.

[2] *Ibid.* II. 625.

practice of producing the witnesses themselves at the trial, to give their evidence orally in open court—though well-established in non-political cases at least as early as Elizabeth's reign[1]—did not become usual in trials for treason until the Commonwealth[2]. Under James I. and Charles I. the evidence produced to the jury in political trials usually consisted only of "examinations," *i.e.*, reports of what had been said by witnesses when interrogated by royal commissioners, in the absence of the prisoner and in private—perhaps in prison or even on the rack. Often the accused himself was thus interrogated; as when Peacham, in 1615, was examined "before torture, in torture, between torture, and after torture[3]." But from the time of the Commonwealth onwards the modern course of trial has prevailed, in political as well as in non-political cases.

To serve as a petty juror in criminal cases (or as a common juror in civil ones) a man must (1) be over twenty-one years of age[4]; and (2) be the owner, in fee or for life, of lands or tenements worth £10 a year, or of long leaseholds worth £20 a year, or else be the occupier of a house rated at £20 a year, or if in Middlesex at £30[5]. In each county the sheriff returns a "panel[6]," or list, at every assize, of persons

[1] Sir T. Smith's *Commonwealth of England*.

[2] The provision made (*supra*, p. 275) by 1 Edw. VI. c. 12 to secure the production of at least two witnesses in open court in all cases of treason was regarded as having been impliedly repealed soon afterwards by 1 and 2 P. and M. c. 12.

[3] *Supra*, p. 267; 2 St. Tr., at p. 871. On the trial of Lord Essex in 1600 (1 St. Tr. 1333), in which many of these "examinations" were used, Coke, then Attorney-general, blamed the "overmuch clemency" of Elizabeth in having had no witness racked or tortured whilst being examined.

[4] If over sixty he may certainly claim exemption, and perhaps is even disqualified. As to the Irish rule see *Mulcahy* v. *Reg.* L. R. 3 H. L. 306.

[5] 6 Geo. IV. c. 50.

[6] *I.e.* a strip (Latin, *pannus*); the word being usually applied to a strip of wood, but here to one of parchment. In Scottish law, however, the person accused is himself called a "panel," from the moment of his appearance.

thus qualified whom he has summoned. There is no fixed number; but forty-eight is a frequent number at Assizes, and thirty-six at Sessions[1]. From this panel[2] the clerk calls twelve names, and the prisoner then has the opportunity of challenging any of these jurors.

Challenges are now almost unknown in England, though less rare in Ireland[3]. They may be either to the "array" (*i.e.*, the whole panel), where the sheriff has composed it in an unfair manner, *e.g.*, by choosing men on the ground of their religion[4]; or to the polls (*i.e.*, to individual jurors). An individual may be thus challenged either for cause shewn, or even "peremptorily" (*i.e.*, without shewing cause). A challenge for cause may be made *propter respectum, e.g.*, to a peer; *propter affectum, e.g.*, for being near of kin to the defendant; *propter defectum, e.g.*, for infancy or alienage; *propter delictum, i.e.*, on the ground of the juror's having been convicted of some infamous offence, *e.g.*, perjury. These objections may be raised either by the Crown or by the accused. But a "peremptory" challenge can be made only by the accused; and by him only in cases of treason or felony[5]. Hence a misdemeanant cannot exclude his bitterest enemy without legal proof of the hostility[6]. In treason the prisoner is allowed thirty-five peremptory challenges, and in felony twenty.

[1] See in 26 St. Tr. 1243 an instance of so large a panel as 160.

[2] At the Assizes there is also a further panel of "special" jurors, of greater wealth, (33 & 34 Vict. c. 77); but for criminal cases a jury is never taken from this list, except in the very rare cases where the indictment has been found in, or removed into, the King's Bench Division.

[3] In France (Franqueville II. 700) they are employed freely. Maître Lachaud, that most eloquent defender of prisoners, made it his rule, "I challenge every man who looks intelligent."

[4] *Reg.* v. *O'Doherty*, 6 St. Tr. (N. S.), at p. 888.

[5] Hence in treason and felony the jurors are sworn separately—to give the prisoner a full opportunity of challenging each in turn—while in misdemeanor they are sworn in groups of four.

[6] But in misdemeanors the defendant is generally allowed to exercise the privilege (which the Crown possesses in all criminal trials) of requiring

The jury are then sworn[1]. After this has been done, the accused can no longer raise any objection to the indictment for defects that are merely formal[2]. If the case be one of felony or treason, the indictment is then read over to the jury; which is called "charging[3]" them with the inquiry concerning the prisoner. It is not so read in cases of misdemeanor; probably because the defendant is there entitled to a copy. The indictment is then "opened"; that is to say, the counsel for the prosecution addresses the jury; in order to direct their minds to the main questions in dispute, to tell them what evidence he proposes to adduce, and to explain its bearings upon the case[4]. If the prisoner is not defended by counsel[5], this speech is often waived. Such a waiver affords a good illustration of the important principle that a prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or who represents a plaintiff or defendant in a civil litigation. For

any jurors to "stand by," *i.e.*, not to serve unless a full jury cannot be made up without them; (*Reg.* v. *Blakeman*, 3 C. and K. 97).

[1] The form of oath taken by jurors differs in felony and in misdemeanor (*supra*, p. 99) in a manner which illustrates the quasi-civil character that originally attached to offences of the latter grade. See this emphasized vividly by Erskine, 5 T. R. 314.

[2] And even when they are raised before this, the court has power to amend them; (14 and 15 Vict. c. 100, s. 25).

[3] Until they had performed this charge, by completing the inquiry, the common law did not permit them, in these cases of treason or felony, to depart from the custody of the court, however protracted the trial might be. Hence throughout the most famous of Indian criminal trials, that of Nuncomar in 1775, (see Macaulay's *Essay on Warren Hastings*), which lasted eight days, the jury and at least one of the judges slept in the court-building itself every night. In misdemeanors, however, there was (and is) no such necessity. And now by the Juries Detention Act, 1897, (60 and 61 Vict. c. 18), upon the trial of any person for a felony (other than treason or murder or treason-felony) the court may, if it see fit, permit the jury to separate (at any time before they consider their verdict) in the same way as if the trial were for a misdemeanor.

[4] A prosecutor who employs no counsel is not allowed (as he is in summary proceedings) to make any such opening speech, or to examine the witnesses.

[5] Even at the Central Criminal Court, two-fifths are not.

this latter advocate has a private duty—that of doing everything that he honourably can to protect the interests of his client. But the crown counsel is a representative of the State, "a minister of justice[1]"; his function is to assist the jury in arriving at the truth. He should not urge on them any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused[2]. "It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts[3]."

On concluding his address, the prosecuting counsel calls his witnesses, one after another; and each is examined in chief, cross-examined, and re-examined, successively[4]. Then comes the turn of the person accused.

(1) If the accused has no witnesses to call, he may nevertheless himself give evidence on oath (should he desire to do so) and be cross-examined upon it. After doing this (or declining to do it), then

(*a*) if he have no counsel, he may address the jury in his own defence;

(*b*) if he have counsel, the prosecuting counsel may, should there be adequate cause[5], make a second speech, summing up the Crown evidence and commenting on the

[1] 4 F. and F. 499.

[2] *E.g.*, if the prisoner has written one letter confessing the crime, and another retracting this confession, the Crown must not put the former in evidence without producing the latter also. Similarly, if the victim of an alleged assault has been examined by the police-surgeon, this surgeon should be called as a Crown witness, even though his evidence go to negative the assault.

[3] Sir John Holker (when Attorney-general) in *Reg.* v. *Paine* (*The Times*, Feb. 25, 1880).

[4] *Supra*, p. 347

[5] *E.g.*, if the evidence has proved to be other than was indicated in his opening speech; *Reg.* v. *Holchester*, 10 Cox 226.

prisoner's own evidence[1] (if any). Then the counsel for the accused addresses the jury[2].

(2) But if the accused has witnesses, then, so soon as the Crown witnesses have finished, his counsel[3] (or he) "opens" his case. Then his witnesses (including himself, if he desire to give evidence on oath) are examined, cross-examined, and re-examined[4]. His counsel (or he) makes a second speech, summing up the defence. Finally the prosecuting counsel makes a speech in reply.

When both cases have thus been fully stated it becomes the duty of the judge to sum up the case to the jury; a security for justice (as Sir Henry Maine has pointed out[5]) unknown to the tribunals of classical antiquity. For he not only directs them as to any points of law that are involved in the case, but also advises[6] them, less imperatively, as to the bearing and value of the evidence.

[1] *Reg.* v. *Gardner*, L. R. [1899] 1 Q. B. 150.

[2] By a somewhat harsh privilege, the Attorney-general or Solicitor-general, *if present in person*, may—in both (*a*) and (*b*)—make a final speech in reply. Otherwise a prisoner, by calling no witnesses, secures the right to the last word. In Scotland he always has that right, even though he call witnesses. In most of the United States he never has it. In France always.

[3] Where several prisoners, who are being tried together, take the same course as to calling (or not calling) witnesses, their respective counsel usually make their speeches (not in order of professional seniority but) in the order in which their several clients' names occur in the indictment; (*Reg.* v. *Barber*, 1 C. and K. 439). Where, again, some prisoners call witnesses but others do not, the counsel for the latter will have the right to the last word; and so will not speak until after the Crown counsel has replied upon the evidence tendered by the other prisoners; (*Reg.* v. *Burns*, 16 Cox 195; cf. C. C. C. Sess. Pap. XCVIII. 363, CVII. 147, CXI. 602, CXIX. 22).

[4] In the rare cases where the witnesses for the defence introduce new matter of importance which the prosecution could not have foreseen, rebutting evidence, to contradict them, may be called even at this late stage. *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 384; *Rex* v. *Stimpson*, 2 C. and P. 415.

[5] *Popular Government*, p. 91. But in France the judges were relieved in 1881 of this duty of summing up; as they were thought to exercise it too exclusively in the interests of the prosecution.

[6] *Supra*, p. 473 n.

The jury then have to consider their verdict[1], and may, if necessary, retire for this purpose. The jury may, at their discretion, return either a "special" verdict, *i.e.*, one on the facts alone[2], or a "general" verdict, pronouncing on both the facts and the law[3]; *i.e.*, "Guilty," or "Not guilty." The verdict may dispose of the whole indictment in the same way, or may pronounce the prisoner guilty on some counts but not on others, or even on one part of a divisible count but not on the residue. We have already seen that, in a few exceptional cases, juries are empowered by modern statutes to convict of an offence other than that which the evidence has established[4]. The first delivery of the verdict is not final; for the court may direct the jury to reconsider it[5].

We have said that of all the persons who are indicted nearly three-sixths plead guilty. We may add that about

[1] A verdict must be the utterance of twelve jurors; so that in the petty jury, as there are but twelve, unanimity is essential. But in any larger jury, such as a grand jury or a coroner's jury, or a jury on an inquisition of lunacy—and similarly with the Peers (*supra*, p. 419)—a mere majority suffices, if it consist of twelve. In Scotland (the jury there consisting of as many as fifteen) the verdict of a majority suffices. In India, a High Court jury is of nine, and the verdict of six suffices if approved by the judge, whilst in the Sessions courts the verdict of a simple majority suffices, if approved by the judge. In France, a simple majority suffices.

[2] These are rare; but a modern instance occurs in *Reg.* v. *Dudley*, L.R. 14 Q.B.D. 273 (K. S. C. 61); *supra*, p. 75.

[3] It has sometimes been suggested that the jury are thus "made judges of the law as well as of the facts." But this is not so; for it is their duty to adopt the law as laid down to them by the judge. (See 21 St. Tr. 1039; and, in U. S. A., 2 Sumner 243, 1 Curtis 48, 15 Sup. Ct. 273.) It is true that there is now (contrast 6 St. Tr. 967) no legal redress if they violate this duty; *e.g.*, if they declare a homicide to have been justifiable although committed under such circumstances as to be in law a murder—or to have been a murder although by law it was justifiable. But this legal impunity only shews that their duty of making their verdict accord with the law, is—like their duty of making it accord with the evidence—not a jural but a constitutional and an ethical obligation.

[4] *Supra*, p. 462.

[5] *Reg.* v. *Meany*, L. and C. 213.

two-sixths are tried and found guilty, and more than one-sixth[1] are tried and acquitted.

After conviction, but before judgment, was the usual time to pray Benefit of Clergy[2] (though it might have been raised on arraignment as a special plea). This privilege was so remarkable that it deserves the student's attention. After William the Conqueror separated the ecclesiastical from the secular courts, the clergy began to put forward a claim that all persons in holy orders should be exempt from secular jurisdiction in all litigation, civil and criminal. Any clerk accused of crime was accordingly sent to the bishop's court. He was tried there before a jury of clerks, by the oaths of twelve compurgators; a mode of trial which usually insured him an acquittal. But even if he were convicted, the court could not inflict death, but could only degrade him and imprison him. About 1300, however, a change was made; by surrendering no accused clerks to the bishop until after they had undergone conviction in the secular court, and had thereby forfeited their chattels. And it was also settled that the clergy had no such "benefit" in civil cases, or in misdemeanors, or (soon afterwards) in treason. But, on the other hand, the benefit was extended to all persons eligible for ordination, although not actually ordained; *i.e.*, to all males who could read[3]. But in 1487 it was enacted that these mere laymen should have the benefit only once, and

[1] It is noted in the Judicial Criminal Statistics, issue of 1902 (p. 11), that the admission of prisoners as witnesses "has had no appreciable effect" upon these proportions.

[2] See Pollock and Maitland I. 424.

[3] By a singular coincidence even the Arabs of modern Algeria have recognised learning as a ground of criminal immunity. Abd el Kadr said:—"More than once I have remitted sentence of death on a criminal from the mere fact of his being a scholar. It requires so long a time in Algeria to become well instructed, that I had not the courage to destroy in one day the fruit of years of laborious study." (Churchill's *Life of Abd el Kadr*, p. 145.)

should be branded on the thumb to shew that they had once had it[1]. Under Henry VIII. benefit of clergy was removed from "wilful murder of malice aforethought" (*supra*, p. 124). Under Elizabeth all surrenders to the bishop, and all distinctions between ordained clerks and laymen, were abolished; and henceforth every person who obtained the benefit became liable to be kept in gaol for a year. Under William III. the benefit was extended to women, and independently of their being able to read; and under Anne reading was made unnecessary for men also. On the other hand, successive statutes took away the benefit from the more heinous crimes; until in Blackstone's time there were one hundred and sixty felonies in which it could not be claimed, *i.e.*, which were really capital. Finally, in 1827, benefit of clergy was definitely abolished by 7 and 8 Geo. IV. c. 28.

Judgment.

Already, in our successive accounts of the various kinds of criminal offences, we have mentioned, in connection with each one, the character of the punishments which the law prescribes for it. All that now remains, therefore, is to state some provisions which affect punishment in general. Thus the Bill of Rights[2] provides that "excessive fines ought not to be imposed, or cruel and unusual punishments inflicted." Accordingly judges have no power to create new punishments[3].

[1] A book of 1633 (*Whimsies*, p. 69) says, "If a prisoner, by help of a compassionate prompter, hack out his Neck-verse (Psalm li. 1) and be admitted to his clergy, the jailors have a cold iron in store if his purse be hot; but, if not, a hot iron, that his fist may cry *Fiz*."

[2] 1 W. and M. st. 2, c. 2.

[3] Thus, where a defendant was sentenced to be imprisoned, and also to ask the prosecutor's pardon and advertise the fact in certain newspapers,

The forms of punishment now permitted by law are death, penal servitude, imprisonment (with or without hard labour), whipping, fine; and, in the case of juvenile offenders, detention in reformatories.

The penalty of Death is now practically restricted to cases of murder[1]. The average annual number of capital sentences is a little under thirty, and only about half of these are actually carried out[2].

Penal servitude was established in 1853[3] to take the place of transportation[4]. It is never imposed for less than three years[5]; whilst, on the other hand, the usual maximum for which a person can be sentenced to imprisonment with hard labour—or to any form of imprisonment for a statutory[6] offence—is only two years[7]. The number of sentences of

this was held to be a bad sentence, except as to the imprisonment; (*Rex* v. *Collier*, 1 Wilson 332).

[1] There are, however, three other capital offences: viz., treason and certain forms of piracy and arson (*supra*, pp. 163, 275, 317). But although since 1820 eighteen persons have been convicted of treason, the death sentence has in every case been commuted.

[2] The Home Office has issued a recommendation (January, 1901), that executions should be deferred until the week following the third Sunday after the passing of the sentence; and should take place at eight in the morning, and not on a Sunday or a Monday.

[3] 16 and 17 Vict. c. 99.

[4] Transportation had been originally established by the device, which in 1665 Kelyng (fo. 45) treats as still novel, of giving pardons conditional on the convict's remaining in a colony for seven years, and passing five of them in service. At the end of that service he received a grant of land.

[5] 54 and 55 Vict. c. 69. Until this statute the minimum was five years.

[6] Where it is by the common law that a punishment is prescribed, there is no maximum limit to the period of imprisonment; but hard labour can only be imposed by statute.

[7] Practically speaking, a sentence of two years' imprisonment with hard labour is fully as severe as one of three years' penal servitude. For a convict in penal servitude is only kept in separate confinement for part of his first year alone; and spends all the remainder of his term in associated labour. Moreover his dietary is more liberal than in most of an imprisonment, and his labour less continuously severe, and more often in the open air. But his privilege of earning by good conduct (as fourteen convicts in fifteen do) a ticket of leave, releasing him after serving about three-fourths of his term,

penal servitude passed in 1905 was 976; being about one to every ten of the convictions upon indictment.

An offender who, after having once been convicted of any felony, is again convicted of some felony, may, as a rule, be sentenced to penal servitude for life[1]. But a misdemeanant's legal maximum of punishment (except by special statute) is not thus affected by his former offence.

At common law, Imprisonment involved simply the deprivation of liberty; but now it may take several forms: (*a*) In most cases, an obligation to do (not only work, but) hard labour may be added to it. Such imprisonment was first authorised in 1776. (*β*) Ordinary imprisonment, without this hard labour, is now known technically as that imposed upon "offenders of the Third Division." (γ) Below this is that of "offenders of the Second Division"—a new class introduced[2] by the Prisons Act, 1898[3]; who enjoy easier discipline, *e.g.*, as to letters and visits. Persons imprisoned in default of finding sureties must be placed in this class. (δ) A still lighter form of imprisonment is that of the "offenders of the First Division"; (who correspond to those who before 1898 were called "first class misdemeanants"). These do not wear prison dress, and in fact incur little inconvenience beyond the mere detention. All persons imprisoned for sedition[4], for criminal contempt of court[5], or for offences against the Vaccination Acts[6], must

has been extended by the Prison Act, 1898, and an Order of 1907, to persons undergoing mere imprisonment, even of the briefest.

[1] 7 and 8 Geo. IV. c. 28, s. 11; as modified by 20 and 21 Vict. c. 3, s. 2. An exception to the general rule is that the maximum punishment for simple larceny, after a previous conviction for any felony, is ten years' penal servitude; 24 and 25 Vict. c. 96, s. 7.

[2] In order to keep those prisoners that are not of criminal habits out of all contact with the hardened offenders. *Infra*, p. 484 *n*. 1.

[3] 61 and 62 Vict. c. 41. It is useful in cases like default of fine, drunkenness, petty assaults.

[4] 40 and 41 Vict. c. 21, s. 40.

[5] 61 and 62 Vict. c. 49, s. 5.

[6] *Ibid.* s. 41.

be placed in this division. These are the only forms of criminal imprisonment[1]. (But there exists also an even more lenient form which is used only in civil cases; *e.g.*, in imprisonment inflicted on account of wilful refusal to pay a judgment debt, or to pay a sum of money for which an order has been made at Petty Sessions in some civil proceeding.)

In all cases except those few offences allotted by statute to a particular division, it is for the judge to decide, at his discretion, in which division prisoners shall be placed; but if no order be made they will be put into the third[2].

Youthful offenders (*a*) if between twelve and sixteen years of age may, in lieu of imprisonment, be sent to a reformatory school for a period of not less than three, and not more than five, years[3]; and (*b*) if under twelve may, when summarily convicted, be sent to an industrial school.

Whipping is a punishment which is authorised by statute[4], even for adult male offenders, in the case of robberies with violence, and also in the case of "incor-

1 In 1905 the number of criminal sentences of imprisonment *without* option of a fine (only 8039 of these being after trials on indictment) was:—(α) with hard labour, 84,817; (β) in the third division, 2703; (γ) in the second division, 1092; (δ) in the first division, 5. And 1186 juvenile offenders were sent to reformatories, and 5134 to industrial schools. At assizes, great care is taken to send to the Second Division such offenders as had never fallen into crime before. But justices of the peace have as yet availed themselves far too little of this valuable power of classification; (see the Prison Comm. Reports, 1905, p. 20, 1906, p. 14).

2 When a man is convicted of several offences in one indictment the sentences of imprisonment passed upon him for them may be either concurrent or cumulative; (*Rex* v. *Williams*, 1 Leach 536).

3 56 and 57 Vict. c. 48, s. 1; 62 and 63 Vict. c. 12, s. 1. The parent may be ordered to pay up to five shillings a week for the youth's maintenance. By the Youthful Offenders Act, 1901 (1 E. VII. c. 20) a fine or costs imposed *summarily* on an offender under sixteen may be exacted, instead, from his parent, if the latter's habitual neglect of him conduced to the offence.

4 The character of the whipping is regulated by 26 and 27 Vict. c. 44, s. 1. The whipping of females is no longer allowed; (1 Geo. IV. c. 57).

rigible rogues[1]." Boys who are under the age of sixteen may be sentenced to a whipping in a very much wider range of cases, including various offences against the Larceny Act, 1861, the Offences against the Person Act, 1861, the Malicious Damage Act, 1861; and boys under fourteen[2], when convicted summarily of *any* indictable offence, may be ordered to be whipped, with or without other punishment.

Fining[3] is a punishment rarely resorted to in the higher criminal courts. It is employed in little more than one per cent. of the convictions upon indictment, and this only in cases where the offence involves little or no moral guilt. But it is inflicted by courts of summary jurisdiction in about ninety per cent. of their convictions for petty offences.

By the repeal of almost all the statutes which prescribed for certain offences minimum punishments, English criminal courts have obtained, in effect, an almost complete power of remitting punishments—a discretion very rarely intrusted to judges under the continental codes[4].

Besides these punitive measures, a court may also make orders whose effect is of a purely preventive character. Thus with the object of removing the young from criminal surroundings, a court of Petty Sessions may order children

[1] *Supra*, p. 323.

[2] 42 and 43 Vict. c. 49, s. 10 (1), s. 11 (1). In 1901, 2,868 persons were whipped; but only 32 of them after an indictment.

[3] A fine must be distinguished from the (now vanished) amercement. An amercement was a pecuniary penalty fixed by the jurors; but a fine is fixed by the court. The earliest fines were compositions agreed upon between the judge and the prisoner, to avoid imprisonment, at a time when the King's judges had no power to impose pecuniary punishments; (Pollock and Maitland, II. 515).

[4] The evil effect of minimum punishments in creating in the minds of juries an exaggerated reluctance to convict is vividly illustrated by the fact that on the recent abolition of the minimum limit of punishment (ten years' penal servitude) for unnatural offences, the percentage of trials for such crimes which ended in convictions rose at once from the remarkably low rate of 35 to 47. *Criminal Judicial Statistics*, issue of 1896, p. 26.

frequenting the company of thieves or found begging, and destitute children who are orphans or whose parents are undergoing penal servitude or imprisonment, to be sent to a certified industrial school till they reach the age of sixteen[1]. Another preventive measure is that of Supervision of an adult by the police for a fixed period after his punishment; for whenever a prisoner is convicted of felony, or of one of certain grave misdemeanors, after having been previously convicted of a crime of equal degree[2], the judge may direct that, after completing his sentence, he shall be subject to supervision for a specified period. Again, even a person who has not actually committed any offence at all may be required to find sureties for good behaviour, or to keep the peace, if there be reasonable grounds to fear that he may commit some offence, or may incite others to do so, or may act in some manner which would naturally tend to induce other people (against his desire) to commit one[3].

After the judgment itself has been given there are further Orders which the judge may have cause to make.

(*a*) Of one such we have already spoken[4]—the order which, after any trial for theft, the court may make for Restitution, to the true owner, of stolen property which has been identified at the trial.

(*b*) Another, of much more frequent application, may be made in respect of Costs. In criminal law costs do not "follow the event." The common law knew nothing of

[1] The Industrial Schools Act (29 and 30 Vict. c. 118), s. 14.

[2] Prevention of Crimes Act, 1879 (42 and 43 Vict. c. 55), s. 8. And at the opposite extreme, an offender who deserves *no* actual punishment may be supervised; but by a "Probation Officer": see *infra*, p. 512 *n.*

[3] *E.g.*, a controversial lecturer, whose open-air addresses are such that a breach of the peace will naturally result, may be required to find sureties. *Wise* v. *Dunning*, L. R. [1902] 1 K. B. 167. But see p. 282, *supra*, as to the subtlety of the distinction to be drawn between this case and that of *Beatty* v. *Gillbanks*, L. R. 9 Q. B. D. 308.

[4] *Supra*, p. 224.

costs. And the statutes which introduced them[1] did not mention the Crown;—an omission which Blackstone elevates into rules that it is the prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them[2]. Hence as all criminal proceedings are technically at the suit of the Crown, no judgment for costs could be given in them. Even if the prosecution were in fact brought by a private individual, the law did not reimburse him for the outlay he had incurred in discharging this public duty. But the courts are now empowered by statute[3] to order payment to a prosecutor, out of the funds of the county, of his own and his witnesses' expenses (including their expenses before the committing justice) in the case of indictments for any felony and for certain specified grave misdemeanors[4]. (Among these misdemeanors are included false pretences, perjury, and all misdemeanors comprised in the Criminal Law Consolidation Acts of 1861 and in the Criminal Law Amendment Act, 1885). Forty years later[5] the same principle was extended to the payment of the expenses of the prisoner's witnesses[6]; provided that they have been bound over at the preliminary examination to appear at the trial —a proviso useful as encouraging an early disclosure of the line of defence[7]. The prisoner receives this assistance whatever be the crime he is indicted for; even though it be one

[1] The earliest was the statute of Gloucester, 6 Edw. I. c. 1.

[2] III. 400; cf. *Rex* v. *Abp of Canterbury*, L. R. [1902] 2 K. B. 503.

[3] 7 Geo. IV. c. 64, s. 23. The scale of costs allowed to witnesses is fixed by the Home Secretary. The present scale (that settled in 1903) is, unfortunately, lower than the scales authorised in civil courts, although the importance to the community of the due attendance of witnesses is certainly greater in criminal ones.

[4] The average sum paid is about £10.

[5] 30 and 31 Vict. c. 35, s. 5.

[6] But, though the witnesses are thus provided for, no contribution is made for the rest of the costs of a defence, even though it have proved successful—an omission which becomes conspicuously oppressive whenever criminal proceedings are resorted to for the purpose of testing the validity of any civil right.

[7] Cf. p. 451, *supra*.

of those misdemeanors in prosecutions for which no such allowance is made to the witnesses for the Crown.

Besides these orders upon public funds, an order for costs may now sometimes be made upon the actual parties to the criminal proceedings. Thus when the Forfeiture Act, 1870[1], released all persons convicted of treason or felony from that loss of property which the common law used to inflict upon them, it very justly imposed upon this property a liability to discharge some of the losses which the crime had caused. Accordingly, the court which convicts such persons may order them to pay the expenses of the prosecution. And, on the other hand, a prosecutor who under the Vexatious Indictments Act[2] has been actually bound over to prosecute, or any private prosecutor in an indictment for libel[3], may be required to pay the general costs of the defendant if he be acquitted.

(*c*) The common law knew nothing of orders for Damages in any criminal proceedings. They are instituted for punitive and not compensatory purposes. But a great economy of time and money is effected whenever a single judicial investigation into any wrongful transaction can be made to cover all its consequences, reparative as well as penal. Hence the French code freely permits the appearance, at criminal trials, of a *partie civile* to claim damages against

[1] 33 and 34 Vict. c. 23, s. 3; *supra*, p. 95. Till 1870, mere conviction for treason or felony, even though not followed by judgment, involved a forfeiture of the prisoner's goods. And a sentence of death for treason or felony involved, as a necessary consequence, an "attainder" (4 Bl. Comm. 374). A person attainted (*attinctus*, "blackened") became dead to civil rights; his lands were forfeited, and his blood was "corrupted," so that descent could not be traced through him. These consequences were abolished by the Forfeiture Act. But an attainder itself may still be produced by a judgment of outlawry; though such judgments are, in practice, obsolete. The last is said to have been in 1859.

[2] 30 and 31 Vict. c. 35, s. 2; *supra*, p. 465.

[3] 6 and 7 Vict. c. 96, s. 8.

the prisoner[1]. An experimental, and therefore very limited, step in this direction was taken by the Forfeiture Act, 1870[2]; which in cases of felony empowers the court to order a convicted prisoner to pay a sum not exceeding one hundred pounds, by way of compensation for any loss of property suffered by any person through the felony. Thus a prisoner convicted of forging a bill of exchange may be made to repay to the prosecutor money which he has lost by discounting it. But the clause, it should be noticed, is limited to losses of property and does not extend to injuries to the person[3].

9. *Reversal of Judgment.*

Along with the steps which may be taken at this stage to secure a revision of any supposed error in the judgment it may be convenient to recall those other modes and occasions of appealing to higher tribunals which we have already noticed at earlier stages of the ordinary criminal procedure; as the student will thus obtain a general view of the subject. The following are the prisoner's opportunities, at the various successive stages, of defending himself against errors of law.

I. Before trial.

(*a*) A motion to quash[4] the indictment; for insufficiency apparent[5] on the face of it. Strictly, if made by the defence, it should be made before the prisoner pleads. As the court has a discretion to refuse to quash an indictment, even for a valid objection, there is no appeal from the refusal; and the prisoner, if he wishes to press his objection, must do it by demurrer, or else wait till after trial.

[1] "L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique"; (*Code d'Instruction criminelle*, art. 3).

[2] 33 and 34 Vict. c. 23, s. 4.

[3] For the power to award compensation (*a*) when dismissing trifling charges—if in summary proceedings, up to £10 only—see pp. 433, 512; (*b*) up to £5 for petty malicious injuries to property, see p. 166.

[4] *Supra*, p. 468. [5] *Supra*, p. 415.

(*b*) A Demurrer[1]; alleging, similarly, that the indictment is on the face of it insufficient. The court has no discretionary power of refusing to hear objections so raised. The disadvantage of a demurrer is that a defendant who demurs is regarded by law as having admitted the truth of the facts set out in the indictment. Hence, if he fails in his demurrer, sentence must be pronounced upon him, unless the court allows him to "plead over."

II. After trial.

(*a*) A motion in arrest of judgment; for any objection that appears on the face of the record, (unless it be merely formal, for then it ought to have been taken before the jury were sworn).

(*b*) An application to the recently-established Court of Criminal Appeal.

The creation of a general Court of Criminal Appeal[2], by the Criminal Appeal Act of 1907[3], constituted a revolution in the administration of our penal justice. Previously (except[4] for cases tried in courts of a merely summary jurisdiction) the general principle had been that—whilst in civil cases any miscarriage of justice could be reviewed at the instance of either litigant—in criminal cases no appeal was allowed to either party upon any question of fact, whilst even on questions of law the Crown had little opportunity of appeal and the prisoner not[5] an unlimited one. If a jury wrongfully acquitted a man, the Crown had, as it still has, no redress. If it wrongfully convicted him, his only resource was to apply to the Home Secretary for a pardon—a derogatory form of redress for an innocent man. The Act of 1907 does not enlarge the Crown's opportunities of appeal; but it greatly extends those of every prisoner convicted—after the 18th of April 1908—upon a trial by jury. (To convictions at petty

[1] *Supra*, p. 468. [2] *Supra*, p. 420. [3] 7 Edw. 7 c. 22.
[4] *Supra*, pp. 436–8. [5] *Supra*, p. 420.

sessions[1], or on trials by the peers of the realm, it does not apply.) (A) In the rare cases where his offence is the merely quasi-criminal one of obstructing a highway or public bridge or navigable river, he has the same full freedom of appeal as a defendant in a civil action[2]. (B) And even when the offence charged is a truly criminal one—as in almost all cases it will be—he still has[3]

(1) an *absolute* right to appeal on any question of pure law[4];

(2) a right, *in case of* his obtaining leave either from the judge who tried him or from the Court of Criminal Appeal itself, to appeal on any question of fact, or of mixed fact and law;

(3) a right, *in case of* his obtaining leave from the Court of Criminal Appeal, to appeal against the sentence passed on him; (unless, as in murder, the sentence is one fixed definitely by the law).

A prisoner who desires to appeal should—s. 7 (1)—give notice of his desire within ten days after his conviction; but the Court may[5] grant him an enlarged time. (Accordingly —s. 7 (2)—any sentence of death, or even of corporal punishment, is not to be carried out until the ten days, or the enlarged time, be over; nor until the appeal, if then instituted, be disposed of.) If the prisoner be poor, the Court may assign him, at the public expense, a solicitor and a counsel. A motion for leave to appeal will usually be made *ex parte*, and by counsel; the appellant has no right to be present at it. He has, however, a right to be present at the hearing of the actual appeal, unless it be on a matter of pure

[1] Except those of "Incorrigible Rogues" under the Vagrancy Act, (*supra*, p. 323); s. 20 (2).

[2] s. 20 (3).

[3] s. 3.

[4] But, lest this unqualified right should be abused, the Registrar of the new Court is empowered—s. 15 (2)—to bring before it promptly any appeal on a purely legal point that seems to him quite untenable; and the Court may then deal with it at once, without waiting to hear any arguments from either side.

[5] Except in the case of an offence punishable with death.

law. At actual appeals the Director of Public Prosecutions must—s. 12—see that the prosecutor is duly represented.

On every appeal, or application for leave to appeal, the judge who tried the appellant must—s. 8—furnish to the Court his notes of the trial and a report giving his opinion upon any points arising in the case. (Or, if the appeal involves only a question of pure law, the Court may require the judge to "state a case" as in the old practice of the Court for Crown Cases Reserved; s. 20.) And in view of the possibility of an appeal, shorthand notes are henceforward to be taken, at the public expense, of every criminal trial before a jury (s. 16); thus rendering universal a practice which, by the sedulous caution of the City of London, has been in force at the Old Bailey for nearly two centuries. Moreover the Court, when dealing with the appeal, are empowered (s. 9) to order the production of documentary or "real" evidence, and to receive evidence from witnesses (whether they were called at the trial or not) either in open court or by depositions for the purpose. (But new evidence, not given at the original trial, is never to be made a ground for *increasing* the sentence.) They may also, if necessary, appoint some expert (*e.g.* a chemist or a specialist in lunacy) to act with them as an assessor; or appoint a special commissioner to report to them on any question which involves such a scientific or local investigation, or such a prolonged examination of documents or accounts (*e.g.* in cases of embezzlement), as cannot conveniently be conducted before themselves. Provision is made (ss. 12, 13) out of public funds for all the expenses connected with an appeal, including even those of the appellant's own attendance.

Frivolous appeals (such as have of late impeded so greatly the administration of justice in the United States[1]) are discouraged by various provisions. There is, as we have seen, the necessity of obtaining leave to appeal, whenever the point is not one of mere law. There is also—s. 4 (1)—

[1] See note on p. 498 *infra*.

a provision that, even where the appellant is technically in the right, his appeal may be dismissed if "no substantial miscarriage of justice has actually occurred." There is, further, in the case of appeals that are merely against the sentence, a power—s. 4 (3)—for the Court to alter that sentence by increasing, instead of by diminishing it. Moreover although, during the period that intervenes between the institution of an appeal and the decision of it, the appellant will escape the treatment of an ordinary prisoner (being merely detained in a very lenient custody or even admitted to bail), yet this period will not count—s. 14 (3)—as any part of the punishment to which he has been sentenced; consequently any man who appeals on frivolous grounds postpones thereby the time of his final return to liberty.

But if—s. 4—a substantial miscarriage of justice has occurred, (whether from the judge's wrong decision of a question of law, or from the jury's having returned a verdict that was unreasonable or incapable of being supported when regard is had to the evidence, or from any other cause), then the appeal will be allowed, the conviction quashed, and a judgment of acquittal entered. If the conviction were for theft, the Court can review not only the conviction but also—s. 6 (2)—any order that may have been made for the restitution of the property alleged to have been stolen.

If the appellant has not objected to his conviction, but only to the severity of his sentence, the Court may quash that sentence, and pass instead "such other sentence (whether *more* or less severe) as they think ought to have been passed";—s. 4 (3). If, on *any* appeal, the Court finds that, though the appellant did commit the crime, he did so in a condition of irresponsible insanity, they may quash the conviction, and commit him to custody as a criminal lunatic.

The decision pronounced by the Court will usually be final. But in those rare cases, where a point of law is raised which is of such exceptional *public* importance that the Attorney-General certifies that it is desirable to have the

highest decision on it, that certificate will enable either party to take the case from this Court directly to the House of Lords; s. 1 (6).

The Act leaves untouched the Crown's prerogative of mercy; and the Home Secretary will thus still be able to institute inquiries of his own, in which he will not be limited by the technical rules of evidence. But he may instead (s. 19) refer to the Court of Criminal Appeal either the whole case, to be thereupon dealt with by them as an ordinary appeal, or any special point in it on which he desires their opinion for his own assistance.

The Act does not extend to Scotland or Ireland.

Experience alone can show whether the benefits which the Act will unquestionably secure in remedying miscarriages of justice and (still more) in allaying public alarm as to the possibilities of such miscarriage, will be attended by either of two drawbacks which its opponents have predicted—a multiplication of appeals so numerous as to impede the administration of the law by "a chronic condition of Re-trial," and a weakening of that sense of responsibility in the minds of jurymen which has hitherto been the great safeguard of accused persons. Countless are the acquittals that have been secured by the influence of those impressive words—"Remember that your verdict is final."

10. *Reprieve, and Pardon.*

The execution of the sentence may be postponed, by a Respite or Reprieve[1]; or be altogether remitted, by a Pardon.

Reprieves[2] may be granted not only by the Crown but even by the judge. For, except in cases of murder[3], a judge of assize may not only postpone[4] the delivery of his judgment, but may even, after delivering it, postpone its execution.

[1] Some use these words as synonymous; others distinguish between them, but in various ways. Apparently the most correct usage makes *respite* refer to the act of executing the sentence, *reprieve* to the man sentenced.

[2] 4 Bl. Comm. 387.

[3] 24 and 25 Vict. c. 100, s. 2.

[4] 6 St. Tr. 833.

And, in the case of capital sentences, it is his imperative duty thus to respite it; if the prisoner be proved either to be insane or to be pregnant. But a Pardon lies of course beyond all judicial discretion, and can be granted by no authority below that of the Crown itself[1]. It may either be absolute or be subject to some condition[2]. Pardons may be granted by the King for all crimes, except two. For (*a*) under the Habeas Corpus Act the King cannot pardon the offence of sending a prisoner out of England to evade the protection of the writ of habeas corpus[3]; and (*b*), even at common law, he cannot pardon a person convicted of a common nuisance until after the nuisance has been abated[4], for such a pardon might prejudice the rights of the private persons injured by the nuisance[5]. Moreover[6] upon an impeachment by the House of Commons, no pardon by the Crown can be pleaded as a defence so as to prevent the trial from taking place; but the Crown is not debarred from saving the impeached offender from punishment.

It has often been maintained that a perfect code would remove all necessity for a power of pardon. "Happy that nation," says Beccaria, "in which clemency shall come to be considered dangerous." But long experience has shewn that human foresight is incompetent to frame, and human language to express, a faultless scheme of legislation. The power of pardon therefore—however theoretically formidable, as an instrument which, if exerted to the full, would suffice to overthrow the whole fabric of the criminal law—is one which is indispensable to the wise administration of penal justice.

[1] Anson on the Constitution, II. 228.

[2] *E.g.*, the pardons which introduced transportation; *supra*, p. 482.

[3] 31 Car. II. c. 2.

[4] *Supra*, p. 15.

[5] Contrast the converse rule that it is only *before* any informer has commenced an action that the Crown can grant a pardon in the case of conduct forbidden under some penalty recoverable in a civil action by a common informer.

[6] By the Act of Settlement (12 and 13 Wm. III. c. 2).

. THE SOCIAL RESULTS.

No reader who has perused with attention even the outlines of the English law of criminal procedure and evidence can have failed to notice how effectually its rules have been moulded into such a shape as now affords the amplest practicable security against the condemnation of any innocent man. Accused persons find themselves protected by the humane attitude of the judge[1] and of the prosecuting counsel, by the freedom conceded to the counsel for the defence[2], by the publicity of the proceedings and the right of reporting them[3] to a still wider public, by the stringency of the rules which prescribe the quantity and the character of the evidence[4] which the Crown must produce, by the facilities for securing witnesses for the defence at the cost of public funds, and by the rejection of all convictions from which even a single juror dissents[5]. In the sense of security against mis-

[1] See the cordial appreciation of this attitude by M. Cruppi (p. 50), and M. de Franqueville (II. 389, 477, 687), in the works cited overleaf.

[2] In France, the right to have the assistance of a lawyer during the preliminary questioning of the prisoner (for the *instruction du procès*) was not conceded until 1898; though this questioning may be protracted throughout many months, or even (as in *Prado's Case* in 1888) a whole year. And it is said that even now, the *juges d'instruction* often evade the law of 1898 by relegating the examination to police-officials.

[3] Pollock on Torts, c. VII. s. 3. "Les journalistes, c'est là *le vrai et utile public*"; (De Franqueville, II. 698).

[4] Even so far back as 1722 (as appears from Lord Cowper's speech in *Bishop Atterbury's Case*) lawyers had noticed that English courts required a greater "certainty of evidence" to convict men of crime than continental courts did.

[5] An instructive contrast to this picture may be found in the minute narratives of modern continental trials given by Mr H. B. Irving in his recent *Studies of French Criminals*. He maintains that, in spite of the great legal genius of the French, their administration of penal justice is imperilled, in one direction, by "absence of true cross-examination, loose rules of evidence, and almost unavoidably partial judges," and, in the other, by "undue licence in advocacy, and emotional juries," (p. 126). He describes modern French practice as requiring the judge's questioning of the prisoner at the public trial to be "a caustic, dramatic and closely reasoned

carriages of justice[1] thus inspired in the nation at large, we may find adequate explanation of an anomaly which has often surprised foreign observers of English institutions. They have remarked that our criminal courts, the courts which come most violently into conflict with the interests of the defendants against whom they adjudicate, are not—as would seem natural, and as has actually been the case in many countries—the most unpopular of all our tribunals, but the least so. Moreover the confidence universally felt, that every accused person will be tried by a fair method and in a fair spirit, goes far to facilitate the protection of life and property,

presentation of the case for the prosecution, to which the prisoner must make the best reply he can," (p. 309);—a vivid contrast to the English prisoner's right of utterly refusing to be questioned. This description is corroborated by M. Cruppi (*La cour d'Assises*, Paris, 1898, p. 133), who says "Le président, par son interrogatoire passionné, pendant de longues heures, se fait l'auxiliaire de l'accusation." And a French jurist of the highest authority, the Comte de Franqueville, in his elaborate treatise on *Le Système judiciaire de la Grande Bretagne* (Paris, 1893), "admits that the French preliminary examination, conducted in private, is far from satisfactory; that the form of the *acte d'accusation*, with its recital of every unfavourable point in the prisoner's antecedents, prejudices the accused in the eyes of the jury; that the interrogation of the prisoner by the presiding magistrate is often open to criticism; and that it might be better if counsel for the defence were allowed to cross-examine witnesses directly, instead of being confined to suggesting questions for the Court to put." (This summary of concessions I take from an Essay on this subject, in the *Collectanea* of the Hon. Mr Justice P. M. Laurence (p. 226); which I strongly commend to the student's perusal.)

[1] It is stated by J. D. Lewis (*Causes célèbres de l'Angleterre*, p. 10), that, after a wide study of English criminal trials from the time of James II., he had not found more than three cases in which any person had been (not merely sentenced but) actually executed, who had afterwards been proved quite innocent; viz. the clear cases of Shaw (executed at Edinburgh in 1721 for the supposed murder of a daughter who had in reality committed suicide), of Jennings (executed at Hull in 1762 for theft, by a mistake of identity), and the much more doubtful case of Eliza Fenning (executed in London in 1815 for a supposed attempt at poisoning). That of the inn-keeper Jonathan Bradford, (executed in 1736 for the murder of a traveller), though a case of legal innocence, was one of moral guilt; as he had entered the traveller's room to kill him, but found him slain already by his own valet.

by rendering it far easier in England than in many countries for the police to obtain information and assistance in their efforts to bring criminals to justice[1].

The spirit of fairness and humanity which characterizes English criminal courts is not of recent origin. Recent years have, however, done so much to improve the procedure which this spirit animates, that they have now raised those courts to a degree of efficiency perhaps greater even than that attained by some of the tribunals that have inherited to the fullest the spirit of Anglo-Saxon justice. Says an experienced American lawyer[2], "I prefer the swift and sure, yet careful, methods of English criminal jurisprudence to our own cumbersome, technical, dilatory way of dealing with criminals[3]."

[1] "En Angleterre, tout le monde facilite la tâche de la police. En France, il en est autrement. Nous avons vu un bon bourgeois de Paris recevant les félicitations du préfet de police pour avoir eu le courage de fournir aux autorités des renseignements que même un portefaix de Londres se fût crû deshonoré en cachant. Et puis ce bonhomme de Paris est chassé de son habitation par le mépris des voisins!" (J. D. Lewis, *Causes célèbres de l'Angleterre*, p. 351.) Moreover French juries acquit a much larger percentage of prisoners than English ones do. (*Cr. Jud. St. of* 1896, p. 27.)

[2] Fishback's *Recollections of Lord Coleridge*, p. 55.

[3] The frequent recourse to Lynch law in some of the United States seems partly to arise from a popular dissatisfaction with the delays and uncertainties of the forensic administration of justice. In 1886—1899 there was in the United States an annual average of 170 lynchings (95 per cent. of which were in the Southern States); whilst the annual average of executions by process of law was less than three-quarters of that number. "When citizens," said Filangieri long ago, "see the sword of justice idle, they snatch a dagger." In August, 1903, the President of the United States addressed to the Governor of Indiana a letter concerning lynchings, in which he urged the necessity of "freeing the criminal law from technicality and delay." The Governor of Georgia, at the same time, dwelt publicly upon the necessity of rendering criminal trials more speedy, and of preventing technicalities from delaying punishment. "In no other country is the deterrent effect of punishment so vitiated by delay, chicanery, and futile appeals"; *Autobiography of President A. D. White*, I. 187; cf. II. 77, 501. See also Thayer on Evidence, p. 528; Train's *Prisoner at the Bar*, pp. 336–8.

CHAPTER XXXII.

THE PROBLEMS OF PUNISHMENT.

THE foregoing review of the various modes of punishment now recognised in English criminal law, may recall our remark[1] that neither they, nor the abstract doctrines of Punishment which have given rise to them, can be regarded as having attained a final—or even a temporarily stable—form. Nor can our doctrines as to punishment, and our present modes of inflicting it, even be said to be in logical accord with each other. "All theories on the subject of Punishment," says Sir Henry Maine[2], "have more or less broken down; and we are at sea as to first principles." "The question as to the true principles on which penalties should be awarded for crime is still an unsolved one," said a late Lord Chief Justice[3]. And a most experienced official[4]

[1] *Supra*, p. 36.

[2] *Speeches*, p. 128.

[3] Lord Russell; (Speech at the annual meeting, in Feb. 1896, of the Metropolitan Discharged Prisoners' Aid Society). The consequence is that—as was stated by Lord Herschell in a debate, on Criminal Sentences, in the House of Lords on April 21st, 1890—"Vital differences of opinion are expressed, and acted upon, by judges as to the principles which should regulate sentences...and we see sentences vastly differing in their severity inflicted for the same offence committed under circumstances of the same gravity." Similarly in Ireland, (as was stated by Lord Morris in the same debate), when an effort was made by the judges, a few years ago, to interchange opinions with the view of arriving at some idea as to the gradations of punishment, "it was found to be impossible, and the judges have had to continue to act on their individual responsibility."

[4] Sir Robert Anderson, K.C.B.; late chief of the Criminal Investigation Department, in the metropolitan police. See his articles in the *Nineteenth Century*, Feb. and July, 1901.

has recently gone so far as to maintain that "our whole system of punishing crime is false in principle and mischievous in practice." Continental jurists, similarly, express so much distrust as to the systems pursued in their countries that the International Congress of Comparative Law, at its Paris meeting in 1900, found it desirable to appoint commissioners "to investigate the principles which should determine the proper measure of criminal punishments, alike as to their kind and their quantity[1]." But to Englishmen the importance of arriving at definite principles on this subject is peculiarly great; for our abolition of minimum punishments has given our judges a range of discretion, and therefore of responsibility, not usually entrusted to continental tribunals[2].

Yet, though Penology is thus still an incomplete science, it is an ancient one. The experience of centuries rendered familiar, long ago, various leading considerations which habitually affect the minds of legislators in determining the maximum penalty for any given class of offences, and the minds of judges in determining the particular penalty to be inflicted in any given instance. Thus the ancient Roman lawyers enumerated[3] seven points to be taken account of:—1. *Causa, e.g.*, wanton aggression or parental chastisement; 2. *Persona* (both of offender and of victim); 3. *Locus*,

[1] See the valuable paper of Mr Montagu Crackanthorpe, K.C., in the *Journal of the Society of Comparative Legislation*, June, 1901. In the number for December, 1901, p. 238, will be found the five groups of questions which the Paris Commissioners are now circulating amongst the jurists of all civilised nations.

[2] Cf. Franqueville, II. 706. Sir Raymond West recently cited to the Society for Comparative Legislation an instance in which, under the rigidity of the French Code, it had been necessary in Egypt to sentence a boy who had stolen a turnip to three years' imprisonment. *Supra*, p. 485.

[3] *Dig.* 48. 19. 16. The passage, which is a striking one, is the only extant fragment of Claudius Saturninus, an Antoninian magistrate. Cf. an admirable corresponding enumeration of topics made by Blackstone. (4 Comm. 18).

e.g., sacrilege or not; 4. *Tempus*, *e.g.*, night or day; 5. *Qualitas*, *e.g.*, open theft or secret; 6. *Quantitas*, *e.g.*, theft of one sow or of a whole herd; 7. *Eventus*, *e.g.*, mere attempt or consummated crime. Obviously, there are two main things to be considered—the Offence itself, and the Offender.

I. As regards the Offence, account must be taken:—(1) of the greatness or smallness of the evil likely to result from acts of its class[1]; (2) of the facility or difficulty with which it can be committed[2]; (3) of the frequency or rarity with which, at the particular time concerned, acts of this class are being committed[3]; (4) of the aggravating or extenuating circumstances which accompanied this particular act—for instance, (α) the victim, as where a woman or a child is assaulted, (β) the place[4], (γ) the time[5]; (δ) the company, a crime being more dangerous if committed by a group of men than if by one alone[6].

II. As regards the Offender himself, account must be taken:—(1) of any temptation[7] under which he acted; (2) of his age; (3) of his education, career, and disposition[8]; (4) of his susceptibility to punishment, *e.g.*, an imprison-

[1] Hence (*supra*, p. 275) the severity with which treason is punished, or a sentry's sleeping on duty; even when the ethical guilt is small.

[2] Hence the severity with which servants are punished for thefts of their employers' property; and the leniency usually shown to the rank and file after the suppression of a great rebellion.

[3] Thus, as Sir Robert Anderson points out (*Nineteenth Century*, Jan. 1901), the fact that felonies against property have (in proportion to population) fallen to merely two-fifths of what they were thirty years ago, has made possible the lighter sentences which are now inflicted for them.

[4] Cf. pp. 170, 219, *supra*.

[5] Cf. p. 175, *supra*.

[6] Cf. p. 280, *supra*.

[7] Cf. p. 34, *supra*.

[8] The practice—convenient but questionable (see Lord Cockburn's *Circuit Journeys*, p. 5)—of diminishing a sentence because the accused has pleaded guilty, or has disclosed the whereabouts of the stolen property, may be justified, even in theory, by regarding this attitude of his as proof of a penitent disposition.

ment meaning much more, but a fine meaning much less, to a nobleman than to a ploughman; (5) of the evil which the judicial proceedings have inflicted on him already, *e.g.*, his imprisonment whilst awaiting trial[1].

Numerous as are these determining circumstances, a complexity is introduced by the fact that the same circumstance will not be found always to operate in the same way. We have already noticed this in the conspicuous instance of strong Temptation; which sometimes extenuates the punishment[2], and sometimes aggravates it. For, since the aims for which punishment may be inflicted are numerous—deterrent, preventive, reformative, retributive, reparative[3]—the effect of a circumstance may vary according to the particular aim which is predominant in the mind of the particular legislator or judge. For example, that the person murdered was the husband or wife of the murderer, is usually regarded as enhancing the wickedness of the crime; yet there are some modern codes which treat it as an extenuation[4]. Indeed, "it has often happened," an experienced advocate once said[5], "that the very same circumstance is considered by one judge as matter of extenuation, but by another as a high aggravation of the crime"; and he added, as illustrations, the facility of the offence, the frequency of it, the fact of the offender's being a foreigner, or of his being young (which can be treated either as a proof that he is not yet hardened, or that he is precociously wicked).

Since Romilly's time, the difficulties surrounding this subject have grown greater instead of less. For the

[1] But the habitual and wise practice of taking any such preliminary detention into account, in sentencing a convicted prisoner, requires, as its logical consequence, to be supplemented by some legislative provision for affording to acquitted prisoners pecuniary compensation for the similar detention they may have had to undergo. Cf. p. 515, *infra*.

[2] *Supra*, pp. 34, 35.

[3] *Supra*, pp. 30—36.

[4] *Journal of the Society of Comparative Legislation*, Aug. 1900, p. 351.

[5] Sir Samuel Romilly, in the House of Commons, February 9, 1810.

development, during the last half century, of a science of Criminology[1], has disclosed to us the unexpected complexity of the problems of crime[2]. The jurists of the eighteenth century—Romilly himself, for instance, and his masters Beccaria and Bentham—have earned a just fame through their successful efforts to purge mediæval criminal law of its aimless severities, by abolishing mutilations, minimising the number of capital punishments, and reforming the prisons. But experience has shewn that they exaggerated the simplicity of the problem they were dealing with. They treated the human race as if all its members were possessed of equal moral responsibility, except a few abnormal individuals, all of whom were equal in their abnormality. And they supposed that, if punishment were but aptly selected, the threat of it would effectually restrain all ordinary human beings from crime[3]. But, since their time, the experience of three generations has tested their doctrines. Thus the vast numbers, in every country, of the "Recidivists," who return time after time to prison, has shewn how exaggerated were the hopes once entertained as to the reformative effects of well-directed imprisonment. For soul, as for body, surgery is found far less effective than sanitation. The cure of criminal habits is difficult. But the prevention of them is more easy; (as the remarkable decrease of crime in England during recent years has shewn[4]). Yet even this

[1] The student may refer to Prof. A. Prins' admirable treatise, *La Science pénale*, and to Tarde's *La Philosophie pénale*.

[2] Cf. Ladd's *Psychology*, p. 641.

[3] Even so experienced a lawyer as Romilly could say (in the speech already cited) "If punishment could be made an absolute certainty, a very slight penalty would suffice to prevent almost any species of crime, (except crimes arising from sudden passion)."

[4] The *Criminal Judicial Statistics* issued in 1901 shewed (p. 11) a smaller total of crimes known to the police than in any year since at least 1857 (beyond which date, accurate comparison is not possible). "In 1868, the crimes were 461 per hundred thousand of population; in 1899, only 239, or about one-half as numerous" (p. 11). *Indictable* ones alone are meant.

recent prevention[1] has been effected less by any improvements in the criminal law than by improvements in the social surroundings of the people. Crime has diminished not so much because people were more strongly "deterred" from it by the terrors of punishment[2], as because they were raised further above temptation to it, by the effects of better education[3], purer literature, greater sobriety[4], healthier dwellings[5], increased thrift, more systematic provision for the events of sickness, accident, or fitfulness of employment, and readier assistance for orphans and other destitute children. How much more the criminality of a country depends upon its fiscal and administrative laws than upon the laws that directly concern crime, has been growing increasingly clear ever since, seventy years ago, the Belgian statistician Quetelet first shewed by arithmetical illustrations that the ratio of convictions to population varies both with physical and with economical changes. Familiar examples of this are the decay of smuggling since the reduction of customs-duties, and of piracy since the development of steam

[1] Which, unhappily, is almost peculiar to England. "*Sauf à Genève et en Angleterre*, les statistiques judiciaires de tous les pays signalent une augmentation de la criminalité"; Prof. Enrico Ferri, of Rome, (*La Justice pénale*, 1898, p. 14).

[2] As to the comparatively slight efficacy of punishment in deterring, see Brougham's *Speeches*, III. 238—240.

[3] A connection between ignorance and crime is manifested by the fact that the proportion of persons who can neither read nor write is six times as high amongst prisoners (being about one prisoner in every six) as it is amongst the general population (judging by the signatures to the year's marriage-registers). In Ireland it is only about twice as high; 26 per cent. to 12·7 per cent.; (*Irish Jud. Stat.* of 1906). Of 196,168 persons sent to English prisons in 1905, but 10,197 could read and write well; and but 481 were of "superior instruction."

[4] This is well illustrated by the statistics obtained at Zurich by Otto Lang, which shew Sunday to have, there, nearly thrice its normal seventh share of each week's crime, whilst the four middle (and therefore non-festal) days have only about half their share.

[5] In Ireland, the ratio of indictable offences to population is six times as high in towns as in rural districts; (*Irish Jud. Stat.* of 1900, p. 18).

navigation. Others are the increase of violent assaults in periods of high wages (as also, for a different reason, in the months of heat); and the increase of thefts in years of bad trade or in the months of winter. Not indeed that poverty, in itself, is a main cause of crime. For the parts of England where there are fewest acts of dishonesty are not those where pauperism is at its lowest[1]; nor where it is highest, are they most numerous. But any economic change, which intensifies poverty quite suddenly, will produce a temporary increase of thefts. Experience of the influence of external causes has led some observers of prison-life into extreme generalisations; as when Lacassagne says that "A nation has only just so many criminals as she deserves," or Mr J. W. Horsley that "Crime is only condensed alcohol."

During the present generation, the reaction against the views of the eighteenth century has carried a very important group of jurists—the "Italian" or "positive" school of criminologists—into an opposite extreme. Instead of treating nearly every offender as a responsible being, capable of being deterred from crime by the threat of punishment, these writers, all but discarding any idea of deterrence, tend to treat nearly every offender as an irresponsible being, the victim of either his nature or his nurture, either his defective cerebral organization or his unfavourable social surroundings. This "Scuola Positiva[2]" has formulated a five-fold classification of criminals, grouped accordingly as their crimes spring, respectively:—

[1] Indeed the very opposite is more nearly the case. Cornwall, extremely high in pauperism, has very little theft; whilst Lancashire and Northumberland have four and five times as much theft, yet little more than half as much pauperism; (*Criminal Judicial Statistics*, issue of 1901, p. 53). Similarly, the Prison Commissioners (Report of 1901, p. 12) found that of 1,886 juvenile prisoners there were only 106 who had been led into crime by "want."

[2] The leaders are—the physician Cesare Lombroso, (of whose many books the principal is *L'uomo delinquente*, which has passed through several editions), and the lawyers Raffaele Garofalo, (*Criminologia*), Enrico Ferri, (*Studi sulla*

(1) merely from Passion;

(2) from Opportunity, (the man offending only when exposed to some active temptation and restrained by no external check);

(3) from acquired Habit, (usually the result of social surroundings);

(4) from Insanity, (in its innumerable variety of grades, from mere neurasthenic absence of self-control to active mania);

(5) from innate Instinct, (which these writers regard as usually an atavistic inheritance from some early stage in the development of the human race).

This fifth class, the supposed "born-criminals," intermediate between the madman and the savage, have been subjected to elaborate investigation by the Italian writers; who allege them to be recognisable by pathological signs, visible not only in the skull and skeleton but even in the hands, muscles and eyes. Some Russian psycho-pathologists have carried this so far as to allocate different colours of the eye to different species of crime; finding for instance, chestnut-brown prevalent amongst murderers, and slate-colour amongst robbers.

Of the five groups, the first two are corrigible; but the third (to which most thieves belong) passes easily into incorrigibility, and the fourth and fifth, from the outset, are usually incorrigible. For these last three, therefore, as *déséquilibrés*, the only appropriate treatment is "Segregation," (*i.e.*, non-punitive detention in what is rather an asylum than a prison). And this must continue for an indeterminate period; that is to say, permanently, except when the treatment proves so successful as to bring any particular offender to such a condition of mental health as makes it safe to

Criminalità, Turin, 1901), Napoleone Colajanni, (*La Sociologia Criminale*, Catania, 1889).

release him. Meanwhile the detention is to have not only a curative, but also a compensative purpose; being so regulated as to try to obtain from the labour of the criminal a sum of money which will make amends to the victim of the crime. In the case of offenders of the first two classes the raising of this compensation-money will, indeed, be practically the sole object of their detention.

In these Italian theories, it is obvious that criminal law, properly so-called, disappears from view; and is replaced by civil law in some cases, and by the art of medicine in others. The writers of this school have certainly rendered great services by drawing attention to the necessity of distinguishing between different types of criminals; and by consequently warning legislators against the old error of trusting uniformly to the deterrent efficacy of punishment; and, still more, by warning judges of the necessity of an "Individualisation of Punishment," based on such an inquiry into the career and characteristics of each offender as will make it possible to adapt his particular penalty to his particular needs. But their influence is now waning. The pathological peculiarities upon which so much stress has been laid by them are now shewn to occur in many persons who are free from all taint of criminality; and even should they prove to occur in criminals more frequently than in others, this may be a mere result of economical surroundings, for the surroundings of most criminals are those of poverty. Nor is the innate instinct to crime at all so frequent as these writers assume; experience shews that most criminals are much like other men, and that it is only by gradual steps that they have fallen into crime[1]. Both in the stress the Italians lay upon pathological taints, and in their rejection of a deterrent purpose in punishments, they have been—just

[1] My general estimate of the Italian school, as expressed above in 1902, is almost identical with that subsequently pronounced, in 1906, by no less an authority than von Liszt; see p. 519 *infra*.

as, on the other hand, were the eighteenth-century writers who laid exclusive stress upon Deterrence—too eager to reduce the complex problem of crime to an artificial simplicity.

In the reaction, at the beginning of the nineteenth century, against penal severities, "a theory arose that punishments should be solely directed to the Reformation of the offender[1]." But protracted experience has shewn that noble aim to be far more difficult of achievement than this theory pre-supposed. The great number of Recidivists, a number now increasing in almost every country[2], sufficiently attests this. Thus in England, the number of persons convicted again, after four or more previous convictions, was 32,781 in the year 1891: but it had risen in 1905 to 54,073[3]. Now the great object of criminal law is, as we have said[4], to prevent crime. Hence, if any particular offender has been convicted so frequently as to make it clear that he cannot be kept from crime through the medium of either reformation or deterrence, it remains only to effect that prevention in a direct way, by placing him in a seclusion where it will be impossible for him to repeat his offences. Unless so secluded, he will not only continue his offences, but will also train others to offend, and will moreover transmit his aptitudes to a tainted posterity. "The interests of justice are sacred; the interests of the offender are doubly sacred; but the interests of society are thrice sacred[5]." For social

[1] Sir Henry Maine, *Speeches*, p. 123.

[2] That the mere *proportion* of reconvicted to first-convicted prisoners should be on the increase is, of course, a hopeful sign; as shewing that fewer persons are falling from innocence into crime. But the evil is that even the actual *number* of reconvicted prisoners increases. If so, the prison does not reform. Possibly it even deforms; see T. Holmes' *London Police-Courts*. pp. 230, 234, 244. But better modes of identification account for much of this apparent increase.

[3] *Crim. Jud. Statistics*, issue of 1907, p. 184. In Ireland, out of the prisoners sent to gaol during 1899, no fewer than twenty-six per cent. had previously been convicted eleven times or more.

[4] *Supra*, ch. II.

[5] M. Anatole France.

safety, it has recently been made possible, by the Inebriates Act, to seclude those whose craving for alcohol has proved to be incorrigible[1]. A similar seclusion is still more urgently necessary in the case of a similarly incorrigible craving for crime[2]. (Hence in France, a criminal whose record shews him to be thus hopeless, must be placed in perpetual *relégation*, in a penal colony[3]). As the purpose of the seclusion would not be punitive but merely preventive, the persons detained in such asylum-prisons need not be treated with any greater rigour than would suffice to keep up discipline and to secure their doing enough work to earn their support. Hence there would be no undue severity in protracting the detention to a far longer period than is possible in ordinary imprisonment, or is common in penal servitude[4].

It has been similarly suggested that a like seclusion, (or even a still laxer one, as in farm-colonies under philanthropic surveillance), might be substituted for punitive imprisonment in the case of those offenders who stand at the opposite extreme of the moral scale—the feeble folk who fall into crime from mere weakness of will[5]. The same feeble-

[1] A familiar instance is that of the once-notorious Jane Cakebread; against whom, at the time of her death, (Dec. 6th, 1898), 281 convictions for drunkenness stood recorded. Lord Herschell mentions, however, a woman who underwent actual imprisonment for drunkenness 404 times (Hansard, April 21, 1890).

[2] At the Central Criminal Court, on Nov. 19th, 1900, a young man of twenty-eight underwent his thirty-ninth conviction; and at the Clerkenwell Sessions, three months later, a man of twenty-four underwent his thirty-fifth conviction. For cases of persons imprisoned fifty times and upwards, see the annual Bluebook for 1901 on Scottish Prisons.

[3] The condition of these relégués in New Caledonia is described with praise by a recent observer, Mr G. Griffith, in *In an Unknown Prison-Land.*

[4] But a convict's labour is so ineffective that it never does earn his support. In 1903, the Government brought in a bill to create an "Habitual Offender Division," and a "Long Sentence Division"; in which convicts might thus undergo a detention of longer duration but lesser severity.

[5] Cf. the *Prison Commissioners' Report for* 1901 (p. 39), as to the many various degrees of mental disorder or weakness which so lessen the power

ness which makes them yield to the first tempter, or to the first impulse, makes them also unable to balance motives, or even to feel any deterrent force in so apparently remote a prospect as that of legal punishment. Hence it is not by threats of a punitive seclusion, but only by the direct action of a preventive one, that they can be effectually withheld from committing crime.

Nor are these the only considerations which render necessary some extension of the variety of our modes of dealing with convicted offenders. Multifarious as were the forms of punishment practised by our ancestors, the humane abolition of many of them, the virtual restriction of capital punishment to cases of murder, and the reluctance to inflict corporal pain upon adult offenders, have left us with practically no alternatives but those of penal Detention (in its various forms) and of pecuniary Fines. But a fine is not an adequate punishment for any offences that involve serious guilt[1]. Nor, again, is it a punishment always practically available, even in the case of the pettiest offences. For offenders are often penniless; more than one-sixth of the total number of persons fined go to prison for default of payment[2]. Yet where a fine is an impossible or an unsuitable penalty, it is doubtful whether the only alternative—that of penal Detention—adequately effects the principal aims which the criminal law has in view[3]. Detention may (1) gratify the prosecutor's Resentment, but it does not, as at present organised, afford him (2) any Compensation. It does for the time being, effect

of self-control that the man, with his diminished responsibility, becomes "unfit for ordinary penal treatment, yet not capable of being certified as insane."

[1] And even where a fine would intrinsically be an appropriate punishment, the legal maximum, at present set to it, often renders it inadequate. Thus the statutory *5s.* is a slight set-off from the profits of keeping a shop open all Sunday.

[2] *I.e.* half the total number of our convicted prisoners. Justices should be careful to order them only a Second Division imprisonment, (*supra*, p. 483).

[3] *Supra*, ch. II.

(3) a Prevention of the continuance of the offender's criminal career; but in the case of short sentences, (which "enable one criminal to do the work of many"), the suspension is brief, and far too brief to secure (4) his Reformation[1]. And as regards (5) its Deterrent effects, though both its irksomeness and its degradation are greatly dreaded by those on whom it has never been inflicted, yet it is to be feared that so soon as persons have actually undergone imprisonment, the fear of such incarceration, (in spite of its involving the loss of alcohol and tobacco), ceases to have much influence upon their minds[2]. Thus it is that prison-warders find the old offenders actually easier to manage than the first-convicted ones; for the routine has grown pleasant to them. Hence an experienced official (Major A. Griffiths) has even ventured on the epigram that "one-half of the people in our prisons ought never to have been sent there, and the other half ought never to come out." The unfortunate fact that an actual experience of imprisonment does thus reduce its

[1] Cf. T. Holmes' *London Police-Courts*, pp. 230, 234, "To make a prisoner not only a sadder but also a wiser man, Time must be afforded"; *e.g.*, even a juvenile offender undergoes little amendment in less than three months, (*Report of Prison Commissioners for* 1901, pp. 12, 44). Reformation, indeed, is less often effected in prison, than by the aid of the advice now so constantly afforded upon discharge from prison. It is pathetic to learn that crimes are sometimes committed for the sake of securing this aid; ("You get a helping hand when you leave a prison, but not when you leave a workhouse," said a first offender recently).

[2] "After the first experience, boys who are bad come to like, rather than otherwise, the comforts of a prison cell, with its quietness"; (Governor of Durham Prison, in *Pr. Com. Report of* 1901). "Women often go out of prison, saying they have never been so well or so happy anywhere else"; *Report of* 1901, p. 332. See, again, the same *Report*, pp. 44, 347, 388, 391, 445, as to the contrast between the casual wards of workhouses and the prison, with its better food, warmer rooms, cleaner bedding, and its officers "who speak civil and don't shout at you"; cf. *supra*, p. 323. "Old offenders often commit crime to get into prison, to recruit their energies for fresh depredations"; Dr John Campbell's *Thirty Years' Prison Experiences*, p. 124. Deterrence thus is weakest where most needed.

deterrent power over the offender, (as well as impair his reputation and his self-respect), has led to a widespread exercise, even in cases of felony, of the statutory powers[1] of releasing first offenders without punishment[2]. Hence comes the paradoxical result, that persons whose first offence is a heinous one often obtain an impunity which they would not have enjoyed had they committed some offence so petty as to admit of being punished by a fine. Yet the paradox must be submitted to, until the legislature authorises some less ineligible mode of punishment.

[1] In 1905, there were 8353 persons thus released, after being proved guilty of *indictable* offences; *Criminal Judicial Statistics*, issue of 1907, pp. 58, 60. See, on this subject, an elaborate study by Dr Kaarlo Ignatius, in the *Zeitschrift für die gesamte Strafrechtswissenschaft* for 1901. The persons so released form about one in every six of all those convicted of indictable offences. "We concur" say the Irish Prisons Board (*Report* for 1904, p. viii) "in the conviction expressed in the last Report of the Scottish Prison Commissioners, that 'short sentences of Imprisonment are not only useless for reformation but actually harmful to the prisoner'." "It is an indubitable fact," the English Prison Commissioners similarly remark (*Report* for 1906, p. 20) "that a succession of short imprisonments does a man more harm than good." An offender should not enter a prison except for a period sufficiently long to be capable of developing in him better habits. *Infra*, p. 520.

[2] *Supra*, p. 432. These powers will probably be exercised still more frequently in future; now that the Act of 1907 has included amongst them an authority to place offenders under the care of Probation Officers—an intermediate course between actual imprisonment and absolute dismissal, and often better for a first offender than either of those extremes would be. For by the Probation of Offenders Act, 1907, (7 Edw. 7, c. 17), any court, whether of summary or of higher jurisdiction, which considers that, though an offence is proved, it is inexpedient to inflict actual punishment, may release the offender on recognizances to be of good behaviour and to appear for judgment within three years *if* called on; it may also order him to pay damages and costs, and may place him under the supervision of a Probation Officer, whose duty will be to visit him periodically, report on his behaviour, and "advise, assist, and befriend him." If he behaves badly, he may be arrested and receive sentence for his original offence.

CHAPTER XXXIII.

COMING CHANGES.

THE student's task in mastering the principles of English criminal law and procedure—a task which it is hoped that the present volume may in some slight degree facilitate—will be rendered far more easy, should those principles ever be reduced by the legislature to an authoritative form. But the codification of criminal law—though successfully accomplished in all the leading continental countries, in India, and in several of the principal British colonies—seems in England to be more remote now than it did thirty years ago, when it formed in successive sessions a prominent feature in the programme of Lord Beaconsfield's cabinet. They, in 1878, introduced a Criminal Code Bill, which had been drafted by Sir James Fitzjames Stephen; and reintroduced it in 1879, after it had been recast by a committee of judges, and again in 1880, with some few further alterations. Had the Bill passed, it would not only have reduced the present law to a briefer and more precise shape, but would also have introduced some important reforms. For it would have (1) recast the present distinctions between felony and misdemeanor, (2) recast the present law as to coercion and compulsion, (3) removed from the law of murder all cases of merely "constructive" malice, and (4) simplified the present multiform law as to thefts and frauds. And it would, further, have

effected several changes in procedure; as, for instance, with regard to indictments, venues, special juries, challenges, costs, and appeals. But the Bill still awaits enactment[1].

Meanwhile it is possible that some particular reforms may be effected piecemeal. Thus, as regards the question of Appeals, a fundamental change has recently been wrought by the establishment[2] of a general Court of Criminal Appeal. (One result of this, it may be hoped, will be to lighten the tasks of the Home Secretary. Hitherto, he has received, on an average, in every year some four thousand petitions for remissions of sentences. To about three hundred of these, on an average, he made some concession, partial or complete; usually on proof of some extenuating circumstance, or, less often, on medical grounds. But, happily, only in less than a score of cases, annually, was a remission made necessary by any doubt as to the justice of the conviction itself[3]).

Amongst other possible changes which have come under public discussion are—the adoption, by agreement of the judges, of some approximate standard of sentences for familiar types of crime; the abolition of grand juries[4]; the enlargement of the public provision for the prosecution of offenders[5];

[1] "It is impossible to view without a certain degree of humiliation the entire cessation, during recent years, of any effort to improve the form of English law, and the apathy with which that cessation has been regarded; ...our want [of a criminal code] produces practical and substantial inconveniences" (Sir Courtenay Ilbert, *Legislative Methods and Forms*, 1901, p. 162.

[2] 7 Edw. 7. c. 23.

[3] *Criminal Judicial Statistics*, issue of 1901, p. 218; 1902, p. 164.

[4] *Supra*, p. 457. Mittermaier, *Englische Strafverfahren*, § 15.

[5] At present the Director of Public Prosecutions undertakes only about four to five hundred cases annually; nearly half of which are for acts either of homicide or of coining. See Table XVIII. in the *Criminal Judicial Statistics* of each year. For the success in Scotland of a universal system of public prosecutions, see Lord Cockburn's article in the *Edinburgh Review*, LXXXIII. 202.

the provision, as in France[1], of counsel for the defence of all indicted prisoners; and a more systematic allowance of compensation from public funds to convicted prisoners who establish their innocence[2], or even (as in Scandinavia) to acquitted prisoners who have undergone actual detention in gaol whilst awaiting trial[3]—a detention which takes place under rules more severe than those sometimes applied now to convicted prisoners[4].

But all these are, comparatively speaking, matters of mere detail. The broad rules of English criminal law and procedure—in spite of a few imperfections in their substance and many imperfections in their form—embody such extensive experience, and are animated by so strong a spirit of fairness and humanity, that our criminal courts, great and small alike, may well recall the tribunal depicted by the great novelist[5], "où, dans l'obscurité, la laideur, et la tristesse, se dégageait une impression austère et auguste. Car on y sentait cette grande chose humaine qu'on appelle La Loi, et cette grande chose divine qu'on appelle La Justice."

[1] The *Code d'Instruction Criminelle*, art. 294, compels French assize-courts to assign counsel to every undefended prisoner. For England, see the recent Poor Prisoners' Defence Act, 1903, (3 Edw. 7, c. 38); *infra*, p. 517.

[2] During the last twenty years, such a system has been established by law in Portugal, Scandinavia, Austria, Belgium, and France.

[3] In 1901, the Treasury granted £600 to Mr Charles Lillywhite, who had been brought in custody from New Zealand to Colchester, on a charge of murder, but was discharged by the magistrates. In 1905, it similarly awarded £5000 to Mr Adolf Beck, after actual conviction; on demonstration that fifteen witnesses had been mistaken in their identification of him.

[4] *Prison Commissioners' Report of* 1902, p. 387. In 1905, no fewer than 153 of the acquitted prisoners had been detained in gaol for four weeks or more, and 48 of these for eight weeks or more; (*Criminal Judicial Statistics*, issue of 1907, p. 188).

[5] *Les Misérables*, VII. ch. 9.

NOTE A

(TO CHAPTER XXX)

DEFENCE OF POOR PRISONERS

By the Poor Prisoners' Defence Act, 1903, (3 Edw. 7, c. 38),—taking effect on Jan. 1, 1904—power has been given to justices of the peace, upon committing a prisoner for trial, to certify that a solicitor and a counsel ought to be assigned to him, and the expenses of his defence defrayed out of public funds. Or a similar certificate may, instead, be given subsequently, at any time after reading the depositions, by a judge of the assize, or the chairman of the quarter-sessions, at which he is to be tried.

But this power is only to be exercised where (1) the prisoner has set up before the committing justices some defence which is of such a nature as to render it "desirable in the interests of justice" that he should have legal aid in preparing and conducting his defence, and at the same time (2) he is too poor to obtain such aid at his own expense. A complex alibi is a good instance of such a defence as calls for the application of the Act.

The chief value of the Act lies in its providing a solicitor; for it has long been the practice of the judges in any case of exceptional difficulty, and in all capital cases, if they find the prisoner to be undefended, to ask some counsel to undertake (without a fee) his defence.

NOTE B

(TO CHAPTER XXXI)

After mastering the rules for the drafting of an indictment, the student may impress them on his memory by considering the following practical illustrations.

INDICTMENT FOR MURDER.

Cambridgeshire, to wit.

The jurors for our Lord the King upon their oath present that John Doe, on the 1st day of January in the year of our Lord 1903, feloniously wilfully and of his malice aforethought did kill and murder one Richard Roe; against the peace of our Lord the King, his crown and dignity.

INDICTMENT FOR LARCENY, (WITH A SECOND COUNT FOR RECEIVING).

Cambridgeshire, to wit.

The jurors for our Lord the King upon their oath present that John Doe, on the 1st day of January in the year of our Lord 1903, an umbrella and a gun, of the goods and chattels of Richard Roe, feloniously did steal take and carry away; against the peace of our Lord the King, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Doe afterwards, to wit, on the day and year aforesaid, the goods and chattels aforesaid, before then feloniously stolen taken and carried away, feloniously did receive and have, he the said John Doe (at the time when he so received the said goods and chattels as aforesaid) then well knowing the same to have been feloniously stolen taken and carried away; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity.

NOTE C

(TO CHAPTER XXVIII)

The circuit arrangements are now regulated by an Order in Council made on May 7, 1907. Of the Winter Circuits, some begin as early as Jan. 11 and one ends as late as March 27; (only Manchester, Liverpool, and Leeds have an Easter Circuit); of the Summer Circuits, some begin as early as May 24, and some end as late as July 31; of the Autumn Circuits, some begin as early as Oct. 12, and one ends as late as Dec. 7. The Summer and Winter ones are civil as well as criminal; but at the Autumn one (which is held in only forty-six towns, instead of the fifty-six of the two greater circuits) no civil business is taken, except in Manchester, Liverpool, Leeds and Birmingham.

NOTE D

(TO CHAPTER XXXII)

F. v. Liszt, probably the highest living authority in Germany on such a subject, has recently summed up the present state of the controversy by saying (*Systematische Rechtswissenschaft*, ed. 1906, pp. 218—222), that in spite of the cordial reception which the Italian school has met with amongst the jurists of Southern Europe and South America, its influence is waning elsewhere. Its theories are found to be lacking in scientific foundation, and often to be inconsistent with each other.

But (he adds) it still has rendered lasting services. For it has accumulated a mass of facts, in criminal pathology, which urgently need reexamination by thinkers more circumspect; (though it is impossible to admit that these anomalous predispositions "to run off the rails of Life" occur in criminals in general). And it has warned us not to exaggerate the Deterrent

efficacy of Punishment; "for it is not that panacea for all moral ills which many people even now fancy it to be," and severer penal laws would not check crime amongst the very poor so rapidly as the provision of healthier houses would. Nevertheless we need feel no scepticism as to the permanent necessity for Criminal Law or as to the fact that the spectacle of Punishment—society's most solemn expression of its prohibitions—does go far in restraining ordinary people from the conduct prohibited.

The Italians have also awakened us to the importance of making sure that where Punishment fails to *deter* from crime, it shall at least *debar* from it. For incorrigible offenders a longer imprisonment than mere Retribution calls for, is necessary as a Restraint, for the protection of the public. "All criminalists now condemn the aimless folly of sending an habitual offender to an imprisonment so short as neither to reform nor to deter nor to permanently seclude him." Von Liszt adds that some protracted Seclusion should also be provided, not merely for habitual criminals and for mentally-unbalanced ones, but also for habitual vagrants (the 'incorrigible rogues' who perplex our Quarter Sessions).

For first offenders, on the other hand, experience throughout many countries has now established the importance of suspending all imprisonment, by a Conditional Sentence, until the criminal has shown by further bad conduct that he is unwilling to amend.

The conflict of theories—von Liszt therefore concludes—is thus sufficiently near a settlement to make it the business of every civilised nation to provide itself with a systematised criminal law, based on a scientific investigation of the actual causes of wrongdoing.

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